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THE CASE OF SALOMÉ MÜLLER.

The supreme court of the state of Louisiana has recently been called upon to investigate and decide one of the most interesting cases which has ever come under the cognizance of a judicial tribunal. It would be impossible, from the circumstances of the case as detailed to us, to furnish our readers with a satisfactory statement and report of it, without somewhat exceeding the space usually allotted to a single article in our Reporter. But, we believe, that the singular character of the case, the peculiar nature of the facts disclosed, and the importance of the principles of the law of slavery which were involved in the controversy, and decided by the court, will justify us in dedicating to it the space which it will occupy.

It was a suit for liberty. The plaintiff, Salomé Müller, a young woman, a little more than thirty years of age, alleged in her *petition*, (which is the foundation of a suit in Louisiana) that she was unlawfully held in slavery by one Lewis Belmonti, the defendant; that she was a free white woman of German parentage; that she left Germany with her parents when about three years of age, in an emigrant ship which arrived at the port of New Orleans in the year of 1818; that her mother died on the Atlantic passage; that her father died of the fever of the country, a few weeks after their arrival; and that then, before she had attained a consciousness of her rights, she was reduced to slavery; and from that time, until the in-

stitution of her suit, had been treated as a slave, kept as a slave, and sold as a slave. These are the material allegations of the petition as against Belmonti, who was note harged with cognizance of her rights, or origin, and who was only called upon to relinquish his possession and control of the plaintiff; but the petition also set forth that Belmonti had acquired his possession of her by an act of sale from one John Fitz Miller, who reduced her to slavery after having become possessed of her and her father, together with a sister older, and a brother younger, than herself, by a purchase of their service for the payment of their passage, under the then existing "redemption law" of the state of Louisiana. The defendant, Belmonti, replied to the petition, by a simple general denial of its averments; and then annexing to his answer a copy of the act of sale, with guaranty of title, from John F. Miller to himself, prayed that Miller might be cited to appear and take upon himself the defence of the suit, and that whatever judgment should be rendered against him, if any, should be rendered in his favor against Miller. John F. Miller duly appeared in answer to the citation served upon him at the instance of Belmonti, and he became the real defendant in the suit.

Miller, it seems, is one of the oldest residents of New Orleans, a man who has always controlled a large property, and who, with his mother, the widow Sarah Canby, now possesses large and very valuable sugar planting interests in the neighboring parish of Attakapas. At the trial of the case many witnesses were called on his behalf, who testified to his high character for honor and honesty, and seemed to think it quite incredible that he could be guilty of a mean or dishonest act.

The answer filed by Miller to the petition of Salomé Müller is a full and explicit denial of all her averments. He denies that she is white and free, and alleges her to be of African descent, and rightfully a slave. He denies that he purchased the service of her father with his children as redemptioners, and avers that he received her as a mulattress slave, named Bridget, in 1822, when she was twelve years of age, from one Anthony Williams, of the city of Mobile, who left her with him for sale in August of that year, and to whom he paid the sum of one hundred dollars, as an advance, to be refunded to him upon the sale of the girl. He annexes to his answer, first, a certified copy of an instrument "under private signature," (the civil law term for acts not notarially executed) purporting to be a power of attorney from one Anthony Williams of Mobile, under date of August, 1822, empowering Miller to make sale on Williams's behalf, of a certain mulat-

tress girl, named Bridget, about twelve years of age. Upon this instrument is written the receipt of Williams for the one hundred dollars, alleged to have been advanced to him by Miller upon the girl thus left with him for sale. This basis of the title to the plaintiff, set up by the defendant, will be more fully spoken of when we come to a detail of the testimony. The second document annexed to the answer is, a certified copy of a notarial act of sale, by virtue of the alleged power of attorney. It is dated in February, 1823, a few months after the act of procuration, and is from John Fitz Miller to his mother, Mrs. Sarah Canby, of the mulattress girl Bridget, still called about twelve years of age, for the sum of three hundred and fifty dollars. The next document filed with the answer was a notarial act of sale from Mrs. Sarah Canby to John F. Miller her son, in the year 1835, of the girl Bridget, with her three children, Lafayette the eldest, Madison, and Adeline. In this act of sale, Bridget is called about twenty-three years of age, and Lafayette, her eldest child, five years old. The materiality of these various dates will be seen in the sequel. In the act of sale from Miller to the defendant, Belmonti, in the year 1838, the plaintiff is declared to be twenty-two years of age.

We will now state, as briefly as may be, the facts of the case as disclosed by the recorded testimony. It appears that in the summer of the year 1817, a band of some eighteen hundred Germans, mostly from the province of Alsace, on the Lower Rhine, resolved upon emigration to this country. To that end, they contracted with a shipmaster, and being possessed of some means, for they were nearly all of them respectable farmers and mechanics in their native land, they advanced their passage money. When nearly prepared for departure, the shipmaster absconded with the large amount of money he had received from them, and left them at the Helder, the seaport town of Amsterdam, almost without the means of subsistence. Here they remained several months, fruitlessly endeavoring to recover their rights. But the ship-owners would not allow the vessels to sail, and at length the then existing government of Holland interfered, and made a contract on their behalf for their transportation to the United States. They left the Helder at different times, in three ships, in the autumn of 1817; and after a very long and stormy passage of more than four months, in which they endured all the sufferings of actual shipwreck, and in which more than two thirds of their number died from starvation, and the pestilential atmosphere of the crowded and filthy ships, they all reached the Balize, at the mouth of the Mississippi river, on the same day, in the month of March, 1818 — the first Ger-

man emigrants to the state of Louisiana. But their sufferings and the impositions practised upon them were not yet concluded. The evidence of the government contract on their behalf for their passage, was fraudulently withheld from them, and they were mercilessly subjected to the operation of the redemption law, which then existed in Louisiana and several other states of our union. Their services were sold, for the payment of their passage, to bidders at public auction, who would advance the amounts due for the shortest periods of service. They were forthwith taken into the possession of their various purchasers, and scattered over the country. Many of them remained in New Orleans; some were carried into the country parishes of that state, to labor on plantations; some to Mississippi, and some to Alabama.

The family of the plaintiff, Salomé Müller, were of this band of emigrant passengers by the barque Johanna. The mother, Dorothea Müller, and an infant son, died on the Atlantic. The father, Daniel Müller, with another son, and his daughters Dorothea and Salomé, survived the voyage. A brother of Daniel Müller, and a sister and cousin of his wife, with their families, were also among the emigrants by the Johanna. It appears that the purchaser of Daniel Müller's service, whoever he was — it was not proved to be John F. Miller — carried him, with his children, into the parish of Attakapas, about one hundred miles from New Orleans. His brother, with his family, were carried to Mississippi, and the others of the relatives remained in New Orleans. But a few weeks after the departure of Daniel Müller, with his children, for the performance of their redemption service, the relatives who remained in the city learned that he had died of the fever of the country, and that the boy was drowned in the river. They immediately sent for the two girls; but, notwithstanding repeated and persevering inquiries and researches, all their efforts were fruitless, either to recover them or learn anything whatever of their existence; and at length, concluding that they had gone to join their parents and brothers, they abandoned the inquiry. And thus, from 1818 to 1843, nothing was known or heard of Salomé Müller by her German relatives, and, to this day, nothing whatever has been heard of Dorothea.

It appears that in the summer of 1843, one Madame Karl, a German woman, and one of the Johanna emigrants, happened to be in the lower part of the third municipality of New Orleans, a part of the city but little frequented by any but the Spanish population, and passing the cabaret of the defendant, Louis Belmonti, she looked in, and there saw the plaintiff, Salomé Müller, performing

some menial service. So instantly was she attracted by her peculiar features, and their strong resemblance to those of her German friends and fellow passengers, the Müllers, that she entered the shop, and immediately began to question the young woman. In reply to her numerous and eager inquiries, the plaintiff told her that her name was Mary; that she was a slave, and belonged to Mr. Belmonti; that she was sold to him, four or five years before, by John F. Miller, by whom she had, as she supposed, always been owned. When Madame Karl told her that she was not a slave, but a free white woman, that she knew her parents, and came to this country with them and with her, when she was but a child, she gave no credit to the story, but insisted that she must be misled by some imagined resemblance in her to the family whom she knew. So very positive, however, was Mrs. Karl that she was not mistaken in her supposition, that she prevailed upon the plaintiff to accompany her to the residence of those whom she declared to be her German relatives, about two miles above the city of New Orleans, in Lafayette. She carried her to the house of her cousin and god-mother, Mrs. Schubert, who instantly and unhesitatingly recognized her, without any intimation of the discovery having been previously made, exclaiming, "My God, here is the long-lost Salomé Müller!" As many of the German emigrants of 1818 as could be gathered together were now brought to the house of Mrs. Schubert, and every one of the number who had any recollection of the little girl upon the passage, or any acquaintance with her father and mother, immediately identified the woman before them with "the long lost Salomé Müller." By all these witnesses, who appeared at the trial (with the exception of Mrs. Karl, who unfortunately died during its progress, and before her testimony could be taken,) the identity was established in the strongest terms. The family resemblance in every feature was declared to be so remarkable, that some of the witnesses did not hesitate to say, that they "should know her among ten thousand;" that they were "as certain that the plaintiff was Salomé Müller, the daughter of Daniel and Dorothea Müller, as of their own existence." One of the witnesses, when upon the stand testifying, saw the plaintiff enter the court-room with a number of other females, and at once pointed her out as Salomé Müller, whom she had not seen till that moment, from the time of their separation, after landing from the barque Johanna in 1818. Among the other Germans who were called into the house of Mrs. Schubert, was the *accoucheuse* who assisted at the birth of the child, Salomé Müller, in the village of Langensoultzback, on the Lower

Rhine. Having identified her, she called Mrs. Schubert into an adjoining room, and asked her if she had a recollection of two very peculiar marks upon the person of the child, resembling moles, and about the size of coffee grains, upon the inner part of each thigh. Mrs. Schubert had a distinct recollection of the marks, from the fact, that after the mother's death upon the Atlantic passage, the care of the little child devolved upon her, and she dressed and undressed it daily for months. The plaintiff was then called into the room, and upon an examination of her person the marks were perceived precisely as they were remembered by her godmother and the midwife.

During the progress of the trial, and after these and other witnesses had testified as to the existence of the marks as one of the means of identity, the judge ordered an examination of her person, out of court, by experts appointed for the purpose. The surgeons who made this examination, testified to the existence of the marks as described by the witnesses; that they were *nævi materni*, or the mother's marks, that they were *congenital*, and could not have been artificially produced.

In this connection it may be as well to state the further evidence resulting from an inspection of the person of the plaintiff. There is no trace of African descent in any feature of her face. She has long, straight, black hair, hazel eyes, thin lips, and a Roman nose. The complexion of her face and neck is as dark as that of the darkest brunette. The witnesses testified that her parents were both of very dark complexion. It appears, moreover, that during the long years of her servitude, she had been exposed to the sun's rays in the tropical climate of Louisiana, with head and neck unsheltered, as is the custom of the female slaves, laboring in the cotton or the sugar field. It also appeared that the parts of her person which had been shielded from the sun were comparatively white.

Allusion was made to an act of sale from Mrs. Canby to her son, John F. Miller, the defendant in warranty, in 1835, of the plaintiff with her three children. Having been reduced to slavery, she was, of course, subjected to its incidents, moral and physical degradation. After the birth of her first child, whom Miller sent to Cincinnati to be nurtured and brought up in the house of his sister, (there is no other evidence of his parentage) it seems that Miller gave her to one of his colored overseers for a wife, who retained her until she was sold to Belmonti for his wife.

It appeared that immediately after her discovery, her friends peremptorily demanded her restoration from Belmonti. He refused

to yield her up, but he told Mrs. Schubert, as she testified, that he had always been afraid that something of the kind would happen, for that Miller told him, a few weeks after his purchase, and when he went to him to rescind the sale, that "she was white, and had as much right to her freedom as any one, and was only to be retained in slavery by care and kind treatment." The suit for freedom was forthwith instituted upon the refusal of Belmonti to relinquish his pretended claim, and we will state, as an interesting feature in practice under the law of Louisiana, that an affidavit of the plaintiff was filed with the petition, setting forth that she had reason to believe that the defendant would maltreat her, imprison her, dispose of her, or send her beyond the jurisdiction of the court, during the pendency of the suit. Upon the reading of this affidavit, the court allowed the plaintiff to *sequester herself*, upon giving a good and sufficient bond, in double the amount paid for her by Belmonti to John F. Miller, conditioned for her safe restoration should the suit be finally decided against her. The bond was given; and the plaintiff has ever since resided with those who claim her as their kinswoman and countrywoman, and who are among the most wealthy and respectable of the German residents of New Orleans.

The trial of the cause in the inferior court consumed many days. Very great interest was felt in the result. The feelings and sympathies of the German community were strongly excited; and upon the other side was arrayed against the plaintiff's pretensions, whatever could be procured by the position, the wealth and influence of the defendant Miller. Upon either side the services of able counsel were secured, and at every point the plaintiff's rights were sharply contested, and as resolutely defended. The facts which we have detailed above were very clearly proved by numerous and respectable witnesses, and, in addition to these, other facts and circumstances, strongly corroborative, were attested by various deponents. The broker, who conducted the negotiation for the sale from Miller to Belmonti, in 1838, swore that he then thought, and it always had been his opinion, that the plaintiff was white. Two or three witnesses, an old Creole woman, who, for many years, had lived in the immediate vicinity of Miller's residence in New Orleans, and men who were in his employment as engineers, in the years 1823, '24, and '25, identified the plaintiff, with the greatest certainty, as the same person whom they had often seen, at that time, in Miller's possession; that she was then a little girl, who spoke the English language quite imperfectly, and with a marked German accent; and that they were told either by

Miller, his mother, or some one of the household, that she was a little orphan girl who came from a ship, and was received by Miller from charity. The cousins of the plaintiff, who reside in Mississippi, and have become wealthy cotton planters upon the very spot where they labored as "redemptioners" in 1818, came down at the trial, and recognized and identified the plaintiff, declaring, in their testimony, that they "knew her as soon as they set eyes upon her." It seems strange that such a mass of evidence could be found, all attesting so conclusively the identity of the plantiff with a lost child, more than twenty-five years after her disappearance, and since she had been seen by any of her family or friends; and after twenty-five such years! — years of servitude and of toil, of bondage labor in the cotton field, beneath the scorching sun — years of servile degradation and infamy, which one would have supposed capable of obliterating all physical and moral traces of her origin and descent, as effectually as they razed from her memory all recollection of days before her bondage, when she thought and spoke in another tongue.

The defence of the case, which seems to have been very ably, and in the inferior court, successfully conducted, did not rest solely on the inherent improbability of the plaintiff's story, though that was largely dwelt upon; and the cases of Martin Guerre of France, Demetrius of Russia, and Perkin Warbeck of England, were cited and commented upon as analogous in the marvellous, to the case at bar — of identity sworn to, and as it was thought, conclusively established by innumerable and disinterested witnesses, and by the most overwhelming corroborating circumstances, and yet, after all, discovered, at length, to be a mistake, if not an imposture.

The strongly excitable and imaginative character of the German mind was also argued in the defence — its fondness for the wonderful, the marvellous, the incredible — its disposition and eager desire to believe the mysterious, the more because of the mystery, as one of the devout believers of their mysterious and essentially incredible religious tenets, declared, "I believe, because it is impossible." Many witnesses were examined, who united in giving to defendant, Miller, a character above reproach; they spoke of him in the strongest terms, as a gentleman of probity, and bore the most emphatic testimony to the character of both his mother and himself for kindness and indulgence to their slaves. Several of them spoke of their recollection of the plaintiff in Miller's possession in 1824 and 1825; that they then supposed her to be a slave, from the fact that she was living with the other slaves and *as* they lived, and was performing servile duty, and they further testified,

that at this time they perceived no German accent in her speech; though it would seem, from their cross-examination, that their opportunity for perceiving this was limited to her occasional compliance with their orders to bring them light for a cigar. One of the witnesses testified to her declarations at this early period, that "she came from over the lake," that "she was of Indian descent," and that "a negro trader brought her to New Orleans."

There was no proof, nor any attempt made by the defendant, Miller, to prove the origin, or descent of the plaintiff. The power of attorney from Anthony Williams, constituted the entire basis of his claim. Anthony Williams did not appear at the trial. He was called for through the public prints, but no response was heard. A reward was offered for information of his existence or whereabouts, but the reward was never claimed. No person was found who could testify that such an individual as "Anthony Williams of Mobile" ever existed. The instrument purporting to be his power of attorney, was attested by two witnesses who appeared at the trial. One of them thought he recognized his own signature, but they both declared that they did not know the signature of Anthony Williams, and never knew such a person. There was no evidence of any further payment to Williams, or any call by him for anything beyond the one hundred dollars, advanced for the girl Bridget, and receipted for on the act of procuration.

But the point of defence mainly relied on, was derived from the testimony of one or two of the defendant's witnesses, as to ages and dates.

It has been stated that the petition averred that the plaintiff in 1818, was about three years of age. Mrs. Schubert, her godmother, testified that this was according to her recollection. Towards the close of the trial, a witness was introduced on behalf of the defendant, a very respectable gentleman, the clerk of the court in which the cause was pending, who swore that the plaintiff was delivered of her first child, Lafayette, in 1825. It is obvious that if this be true, and if it be true that Salomé Müller was but three years of age in 1818, and therefore but nine or ten in 1825, that the identity between her and the plaintiff is destroyed. It did not very clearly appear *how* this witness was able to testify to such a fact, after the lapse of twenty years; the birth of a child, believed by him, as he also testifies, to be the child of a slave. For the purpose of corroborating his evidence, a certified copy of a register of baptism was introduced, under date of 1825, of a child named John, son of a girl named Mary, taken from the records of the church of St. Louis. To make this piece of evidence operative, a

witness was called who swore that the name of the plaintiff's first child was changed from John to Lafayette, and that the plaintiff's name was changed from Bridget to Mary, because Miller had another slave named Bridget. After the introduction of this testimony, it seems that the plaintiff's counsel strenuously urged a temporary postponement of the cause, in order that the best evidence might be offered, first, of the age of Salomé Müller in 1818, and second, of the date of the birth of her first child — the former by a copy of the registration of her birth from the place of her nativity in Europe, (where it is known that the law requires such registration by the officer appointed for that purpose, within twenty-four hours after the birth, and in the presence of two witnesses,) and the latter, by the testimony of the midwife, whose presence could not be immediately procured, and who would testify, as was sworn to, that she was present at the birth of Lafayette, that Mrs. Sarah Canby, the mother of Miller, was also present, and that it took place as late as the year 1828, or 1829. Subsequently, and for another purpose, (on a motion for a new trial) the affidavit of the brother-in-law of Miller, the defendant, was filed, the husband of Miller's sister in Cincinnati, to whom, it has been stated, the child, Lafayette, was sent for nurture. He declares, in this affidavit, that Lafayette was born certainly as late as 1828 or 1829. It was urged, both upon the application for a postponement, and upon the motion for a new trial, that the evidence, to rebut which a postponement and a new trial was demanded, was a surprise upon the plaintiff, inasmuch as it was in obvious contradiction of the record testimony, introduced by the defendant himself. The act of sale from Mrs. Sarah Canby, the mother of Miller, (who was present at the first accouchement of the plaintiff,)to her son made in 1835, declaring the age of Lafayette to be five years, and therefore born in 1830. The court refused the postponement, upon what grounds does not appear.

The case was very elaborately and very eloquently argued, and, after several weeks deliberation, the court decided in favor of the defendant, Miller. It is not our design to review or comment upon what were called the reasons which were filed, as the basis of the decree of the inferior court. Suffice it to say, that the judge denies the principles of the law of slavery contended for by the plaintiff's counsel, (to which we shall presently allude) declares that he cannot divest a citizen of his property upon such testimony of identity as that offered by the plaintiff — though he admits that there must be a most wonderful resemblance between the plaintiff and the Müller family, and that the marks upon *her* person are a very remarkable coincidence —

but says that he is satisfied, from the evidence of the plaintiff's accouchement in 1825, that she and the lost Salomé Müller are not identical, and that there is "no satisfactory evidence that the real Salomé Müller is not now in the parish of Attakapas."

The court, in the reasons for its judgment, recommends the persons who have espoused the plaintiff's cause, and who appear, as he says, very sincerely to be convinced that she is their kinswoman and countrywoman, to purchase her from Belmonti and set her free! The record shows, that within the delays prescribed by law, a motion for a new trial was made, that affidavits, setting forth much additional and newly discovered testimony were filed, and that, in support of the motion, a very ably drawn up printed brief was submitted to the court. But, after reading the reasons for the judgment, we cannot suppose that the plaintiff's counsel could have had any well-grounded hope of success in this motion upon any grounds.

It may be asked, why was a case of this kind subjected to the decision of the court, and not a jury? The answer to this question discloses some peculiarities in the practice and in the jurisdiction of the courts of Louisiana. A jury is never summoned in a case, unless prayed for by the plaintiff, in his petition, or the defendant, in his answer; and the party praying for a trial by jury, must, in order to make his prayer effectual, deposit with the clerk a certain sum of money, in specie, at the time of filing his prayer. If the case is called, and a time assigned for its trial, before such prayer or deposit, the trial by jury is lost, — and this is considered constitutional in Louisiana. But the supreme court of Louisiana, which is a court of appellate jurisdiction only, acting upon the record carried before them from the inferior courts, takes cognizance of questions of fact as well as of law. The entire testimony, in a case appealable, is written down by the clerk of the court below, at the demand of either party; and if the case be appealed, it is transcribed and sent, as a part of the record, to the supreme court, in which court no new testimony is had, and nothing can be added to the record. Thus the verdicts of juries are as much subject to revision and reversal by the supreme court, as are the judgments of the inferior courts upon questions of law. The supreme court, however, has adopted a rule, never to disturb the verdicts of juries, where the question before them was one of damage simply. The case at bar would not have come under this rule, and inasmuch as it was known that the supreme court must at last decide the case, a jury was not prayed for.

Within the legal delays, disregarding the recommendation of the

judge of the district court, Salomé Müller filed her appeal to the supreme court, and in the month of May last, it came up in its regular course for argument before that tribunal. Meanwhile, a very important piece of documentary evidence was received by the plaintiff's counsel, which we will state, and in connection therewith a very important and liberal principle of law, which was contended for and conceded by the supreme court. Pending the appeal, the consul in New Orleans for Baden-Baden had visited Europe, and returning shortly before the argument, he brought with him a certified copy of the registry of birth of Salomé Müller, taken from the records of the prefect of the village of Langensoultzback, in the province of Alsace, on the Lower Rhine. By this it appears that Salomé Müller, the daughter of Daniel and Dorothea Müller, was born on the 10th of July, 1813; and therefore, on the 10th of July, 1818, was five years of age, and not three. In the course of the argument, the plaintiff's counsel offered to read this certificate. It was strenuously resisted by the defendant, as constituting no part of the record, and not to be introduced, or read, or commented upon. After argument, the court admitted it, and it was read, upon the authority of the case of "*Marie Louise* v. *Maret*," in 8 Louisiana Reports, in which the supreme court declares, that, "in suits for freedom, and in *favorem libertatis*, they will notice facts which come credibly before them, even though they be *dehors* the record."

The counsel for the plaintiff were, *W. S. Upton*, *C. Roselius*, and *Francis H. Upton*.

For the defendant, *E. A. Canon*, *W. C. Micon*, and *John R. Grymes*.

The case was called for argument, and opened for the plaintiff on the 19th of May, and from day to day the arguments were continued by the various counsel until the 27th of the same month, when the closing argument for the plaintiff was made by Francis H. Upton, in which the points of law relied upon by the plaintiff were forcibly set forth, and which was regarded, by those who heard it, as one of the happiest forensic efforts ever made before that court. The principles in the law of slavery, which were contended for by the counsel for the plaintiff, as involved in the case, opposed by the defendant, and established by the decision of the supreme court, were briefly these:

First. It was argued that in all suits for freedom, where the plaintiff was not a *black*, that the presumption of law was in favor of liberty and with the plaintiff; and therefore that the whole burden of proof was upon the defendant. This was opposed by

the defendant; and the doctrine of the Spanish law, which made possession under an apparent title of any person, as a slave, sufficient to throw the burden of proof of fraud or violence upon the plaintiff, was contended for as the existing law of Louisiana.

Second. It was argued that the presumption of freedom, in behalf of a plaintiff not a black, being based upon the supposition that such a person might have descended from a white mother, or an Indian, or even a mulattress, in the enjoyment of freedom, it could not be rebutted by the exhibition of any chain of title, however perfect, but could only be overthrown by evidence of the direct descent of the plaintiff from an African slave mother. No case was found in the Louisiana Reports, establishing these doctrines in their full extent, because, as it would seem, no case has ever before arisen, in which their application became necessary, but the case of "*Adele* v. *Beauregard*," reported in 1 Martin's Reports, was cited as an authority fully establishing the first principle, and strongly indicating the opinion of the court upon the second; and a case in Henning & Munford's Reports, also reported in Wheeler on Slavery, Article "Burden of Proof," was relied upon as sustaining the doctrines in their entire strength.

On the 21st of June last, the opinion of the supreme court in this case was read from the bench. The principles of law, as argued by the plaintiff's counsel, were affirmed and established in the plaintiff's favor, in their utmost liberality. Upon the facts, the court expressed the fullest conviction that the plaintiff is, in very truth, the lost Salomé Müller, the daughter of Daniel and Dorothea Müller, who emigrated to our country in 1818; declaring that, if this be not so--that if, in truth, there is or was another person of the same age, with the same peculiar marks upon her person, and bearing such a strong family resemblance in every feature, as to lead every witness who had ever seen her or known her parents, to swear unhesitatingly to her identity, "it would be one of the most wonderful facts in history." The judgment of the district court was therefore annulled and reversed; and the supreme court, proceeding to render such decree as the principles of law and the facts of the case in their opinion demanded, declared that the plaintiff was free and white, and therefore unlawfully held in bondage; and that she be forthwith and forever released from the bonds of slavery.

The question of damage is the subject-matter of another suit, now pending against John F. Miller and Mrs. Canby.

Recent American Decisions.

Superior Court of Judicature, New Hampshire, July Term, 1843.

PIERCE, ET AL. *v.* THE STATE OF NEW HAMPSHIRE, IN ERROR.

The statute of July 4, 1838, "regulating the sale of wine and spirituous liquors," (which provides, "that if any person shall, without license from the selectmen of the town or place where such person resides, sell any wine, rum, gin, brandy, or other spirits in any quantity, or shall sell any mixed liquors, any part of which are spirituous, such person shall, for each offence, on conviction thereof, forfeit and pay a sum not exceeding fifty dollars and not less than twenty-five dollars, for the use of the county,") is a constitutional exercise of the powers possessed by the legislature.

And it was *held* to be no defence to an indictment founded upon it, that the article sold without a license was a barrel of American gin, which the respondents purchased in another state, brought into this, and sold in the same condition in which they purchased it.

ERROR, founded upon the judgment of the court of common pleas, for the county of Strafford. The plaintiffs in error were indicted at January term, 1842, upon the statute of July 4, 1838, regulating the sale of wine and spirituous liquors, which enacted, "That if any person shall, without license from the selectmen of the town or place where such person resides, sell any wine, rum, gin, brandy, or other spirits, in any quantity, or shall sell any mixed liquors, any part of which are spirituous, such person, so offending, for each and every such offence, on conviction thereof upon an indictment, in the county wherein the offence may be committed, shall forfeit and pay a sum not exceeding fifty dollars nor less than twenty-five dollars, for the use of such county." The indictment alleged, that on the 20th of January, 1842, without license from the selectmen of Dover, where they resided, they did unlawfully sell to one Aaron Sias, one barrel of gin, for the price of $11 85, contrary to the form of the statute, &c. The jury having returned a verdict against them, they filed a bill of exceptions, and upon the rendition of a judgment on the verdict, brought a writ of error. Several exceptions were taken.

J. P. Hale, for the plaintiffs in error, contended, among other things, that the statute was unconstitutional, and that this matter was conclusively settled by the case of *Brown* v. *Maryland*, (12 Wheat. 419.)

Walker, Attorney General, argued for the state, and cited upon that point, Crabbe's Hist. Eng. Law, 489; Prov. Laws (2 Geo. I.) 59; Ibid. (5 Geo. II.) 168; *Lunt's Case*, (6 Greenl. R. 413,); *Gibbons* v. *Ogden*, (9 Wheat. 195, 203, 235,); *Mayor, &c., of the City of New York* v. *Miln*, (11 Peters, 102,); *Beal, in Error* v. *The State of Indiana*, (4 Black. R. 107.)

PARKER, C. J. (after adverting to the other points in the case) — The remaining question relates to the constitutionality of the statute, upon which the indictment is founded.

Prior to the revolution, the several colonies had power, with the assent of the mother country, to legislate fully respecting their internal affairs, and of course to prescribe the mode and manner in which trade should be carried on within their respective borders, and to adopt such police regulations as each might deem expedient. Upon the declaration of independence, and upon its recognition, and the establishment of peace, this power of regulating internal trade, and police in general, remained with the several states. There was nothing in the union of the colonies for the purpose of general defence, or in the powers granted to or assumed by the continental congress, at variance or in any way in conflict with such state legislation.

Nor was there anything in the articles of confederation, adopted in 1777, to impair or limit the exercise of legislation upon matters having reference to the mere internal police of the several states. Each state not only managed its internal police according to its pleasure, but exercised that pleasure to a very considerable extent, upon the intercourse of the country with other nations, notwithstanding the recommendations of congress; the articles of confederation, providing that no treaty of commerce should be made whereby the legislative power of the respective states should be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever. This power of laying duties, and regulating and even prohibiting exportation and importation, retained by the several states, was one of the principal causes which led to the subsequent formation of the constitution of the United States.

All the rights and powers which the states possessed before the adoption of the federal constitution they still retain, and may exercise, unless they are taken away, limited, or modified by it. The language of the tenth article of the amendments is express: "The powers not delegated to the United States by the constitution, nor

prohibited by it to the states, are reserved to the states respectively, or to the people." It is very clear that the power of regulating the internal trade, and matters of police, of the several states, is not granted to the United States, nor prohibited to the states. As a general rule, it is undeniable that each state may manage affairs of that description as fully as it might do before the government of the United States was formed, except in cases where there is an express prohibition in the constitution; and if the right to pass laws which regard the prevention of crime, pauperism, and misery, and the promotion of the health and happiness of the citizens, by imposing restraints upon the sale, and upon the excessive use of the means of intoxication, (which has been supposed to be a very important branch of police,) is taken away from them by the constitution, it must be by some grant of power to the general government, inconsistent with further legislation of that description by the several states. And if they are thus deprived of it, by implication, it is lost entirely; for there is no grant of power, in the constitution, which will enable the government of the United States to exercise any such authority. There is no express or implied grant, by which that government can regulate the internal trade of the states in relation to this, or any other article. It has never attempted any such thing. Congress has never assumed to itself any such right, nor ever denied the right of the states.

For more than half a century, the United States have exercised all the powers delegated by the constitution which it seemed good to that government to exercise; and the states, during the same time, have, at their pleasure, passed laws respecting the sale of liquors within their borders, requiring licenses, to such extent as each pleased, in order to authorize sales; and during all this time there has been no conflict, or collision, between the general and state governments on the subject. Nor until very recently, so far as we are aware, was any supposition entertained, that the enactment of laws of that description was not still within the constitutional power of the states. Even now, the denial of this constitutional right comes not from that government, or from any of its officers or agents. There is nothing to show any objection on the part of the constituted authorities of the United States, to laws like that now in question. On the contrary, so far as congress has legislated within its own sphere, its legislation has of late been of a kindred character. This unchallenged exercise of the power for such a length of time, it is admitted, does not prove conclusively that it is constitutional, but it certainly furnishes an argument of no inconsiderable

weight. The inquiry then might be narrowed down to the question, whether this exercise of power by a state is so repugnant to the powers granted in the constitution to the general government, that the states cannot pass laws of that description, there being no action of that government upon the same subject-matter in conflict with them.

But it may be well to take a broader view of the subject. It is, perhaps, not material to the decision of this case, but it may be remarked that state legislation is not to be held unconstitutional, because in its operation it may incidentally and remotely have a bearing upon some of the powers granted to and exercised by the general government — that it may, for instance, in some degree affect, indirectly, the revenue of that government. Various acts of legislation by the states must have a bearing upon that revenue. Every charter of a company for manufacturing purposes may have a tendency to reduce importations. The exemption of any branch of manufactures from taxation, for a limited time, may do so. And so of every act to improve the breed of sheep, or cattle, or to promote the raising of cotton, hemp, or silk.

It is not, therefore, sufficient for the condemnation of a state law, that its possible operation may be to render a particular exercise of a power of the general government of less pecuniary benefit to that government, so long as other modes are left open to it, through which it may fully and effectually accomplish its purposes. If this were enough to render an act unconstitutional, hardly any exercise of authority would be left to the states.

Nor is it sufficient that it may so operate as to induce or even require that government to seek new sources of revenue, by reason of the falling off in a particular branch of trade, if that result is produced by what would otherwise be a constitutional act. The constitutionality of the law does not depend upon the mere degree in which it may indirectly affect a branch of the revenue of the United States. That furnishes no criterion by which to judge of the constitutional right.

In order to render the act unconstitutional, because of its collision with the powers granted to the government of the union, there must be some conflict, or repugnancy, or incompatibility. It must either in its actual exercise, or in its nature, be of a character to control, defeat, limit, or impair, some power of the general government, or interfere with its action so that, if admitted, that power could no longer be efficacious and adequate to accomplish the object for which it was given.

If it merely operates upon the same subject-matter, but not in

such a manner as to show "a plain incompatibility, a direct repugnancy, or an extreme practical inconvenience," it is not unconstitutional, because there may be "a possible or potential inconvenience."

It has been contended, that the statute in question is repugnant to the power of the president, with the advice of the senate, to make treaties, and the powers of congress to regulate commerce with foreign nations, and among the several states.

In relation to the first and second branches of this objection, it might be answered that this case does not necessarily involve their consideration, because the liquor sold by the plaintiffs in error appears to have been manufactured in the United States. But as the argument to be drawn from the power of the United States, to make treaties, and to regulate commerce with foreign nations, is so intimately connected, in principle, with that relating to the power to regulate commerce among the states, we have considered the case as broadly as the objection of the plaintiffs in error has presented it.

It would be foreign to the present occasion, to enter much at large into the causes which led to the adoption of the constitution of the United States, although those causes may well be taken into consideration, when the nature and limits of the powers granted come under review. Ample discussions upon that subject may be found elsewhere. It is enough for our present purpose to remark, that all the powers with which it has been supposed the statute of July 4th, 1835, is in conflict, are from their nature, limited powers, notwithstanding the broad terms in which the grant of power is expressed. It would be impracticable, were we to attempt to enumerate all the subjects to which these powers extend, and to affix precise limits to their exercise. But it is easy to point out matters which are excluded from their scope.

Thus the general power to make treaties, confers authority to negotiate with other governments, and to form compacts relative to the proper subject-matters of treaty stipulation, such as peace, war, commercial intercourse, alliances, &c. A treaty has been defined to be "a compact of accommodation relating to public affairs," but the political rights of the people of the several states, as such, are not subjects of treaty stipulation. It needs no argument to prove, that an attempt on the part of the United States, by compact with a foreign government, to qualify the right of suffrage in a state, prescribe the times and mode of elections, or to restrain the power of taxation under state authority, would transcend the limits of the treaty-making power, and be entirely void; and an

agreement with a foreign government, prescribing the terms on which highways should be laid out in the states, regulating the support of paupers, or the sale of goods by auctioneers, or by hawkers and pedlars, would be of the same character.

The police of the several states, regarded as separate governments, is not a subject-matter to which the treaty-making power extends. And it is not pretended that the treaties which admit liquors, the manufacture of other countries, into this, on the most favorable terms, contain any stipulations which purport to limit the legislation of the several states, after the import has taken the character of property within a state, the act of importation being fully accomplished and perfected. Nothing of that kind, it is believed, has been, or will be, attempted by the government of the United States.

And so of the power to regulate commerce with foreign nations. Under this grant of authority the national government may prescribe rules for the trade with other communities, determine the kind, quality and condition of the articles which may be imported, the time and manner of the transportation, the mode of introduction into this country, and the terms of it; and doubtless provide for their safe-keeping in the public stores, and for a lien upon them until the duty is paid; but should that government attempt to make laws for conducting the internal affairs of the states, under the guise of enactments to regulate foreign commerce, it would be flagrant usurpation. When the articles which previously formed the subject-matter of foreign commerce have become a component part of the mass of property in the hands and at the disposal of the citizens or residents of the state, the business of importation has terminated, and the connection of those articles with the regulations of foreign commerce has ceased; and with the termination of that relation, the right of the national government to regulate the transmission, safe-keeping and sale, ceased also, until they again became articles of foreign commerce, by being exported, or articles of commerce among the states, by a transit to another state. Even before their connection with foreign commerce ceases, they may be subject to the police of the states, as in the case of quarantine laws, and this without conflict, so long as those laws are kept within their appropriate boundaries.

Similar remarks apply to the power to regulate commerce among the several states. This has respect to trade and commercial intercourse between the different states, interchange of productions, and transportation of commodities from one to another, with the means, time, manner, terms, &c. The power

to regulate this commerce is vested in the general government. But that government, under pretence of the exercise of this power, cannot prescribe rules for the sale or taxation of articles which form the subject of it, after they have become the subject-matter of internal trade, within the state whither they have been carried ; nor enact laws to regulate the police of the state, so far as it may affect such articles. That government cannot enact that lottery tickets, or immoral books and pictures, shall not be carried from one state to another, for that would be a law, the end, purpose, and effect of which would be solely a regulation of internal police, affecting the sale, — the mere conveyance of the article from one state to another being, of itself alone, a matter of entire indifference. On the other hand, the power to regulate the internal police of a state, which is lodged in, and guarantied to the state authority, has for its objects, the inhabitants and residents of the state, considered as such, (notwithstanding they at the same time owe duties to the United States, and are under obligations as citizens of that government,) and all the property within its limits which may fairly be regarded as a part of the mass of property in the state. Property may be within its territorial limits, but not for some purposes within its jurisdiction ; as property belonging to the United States, articles of import within the public stores on which the duty has not been paid, &c. An attempt to specify the particular mode and manner in which this power may be exercised would be hopeless and useless. It has relation to the peace, security, and happiness of the community, regarded as a single government, and may provide for the prevention and punishment of offences, the prevention of pauperism and idle and dissolute habits, the preservation and promotion of industry and economy, health and morals. But, notwithstanding it embraces so wide a range, it is not an unlimited power. The several states cannot impose duties upon the entry of goods, nor prescribe what vessels shall come into their ports, or on what terms ; nor give a preference in their markets to articles produced within their respective limits, in order to encourage the industry of their own citizens. Nor can they, under pretence of preventing pauperism, or of providing for the security of their own citizens, prohibit the importation of certain articles from a foreign country, or another state. The transit and introduction of any article of commerce are under the supervision and jurisdiction of the United States, with which a state may not interfere, except in the case of quarantine laws postponing the entry a suitable time for the protection of the health of the community, harbor regulations, and other laws of a similar character.

The power of state police, so far as it relates to those matters which have been the subjects of foreign commerce, or of commerce among the states, acts upon them generally after the transit has been accomplished. When the particular trade between another nation and this country, or between different states, is ended, and the property which formed the subject of it, from being property in one government, and then *in transitu*, has, by that commerce and change of place, become part and parcel of the mass of property in a particular state, released from the charges of the national government, and from its superintendence; that property can claim no exemption from the operation of the laws of the state where it is situate, regulating its safe keeping, sale, and use — those laws being general laws, affecting other property of a like character in a similar manner; and being, in good faith, but parts of the internal police of the state where it is situated, and not in effect, regulations of the commerce which brought it there. The fact that the article had been transported from another nation, or state, and that it had before that time been the subject-matter of commerce between two countries, or states, cannot, after such change is perfected, confer upon it, in respect to the operation of state police, any character different from that possessed by other component parts of the general mass of property there. The general government would no longer be under any obligations to provide for its safe-keeping, or protection, nor owe any duty to the citizens of the state respecting it. And the state, being bound to afford suitable security and protection to it as property there, may regulate it accordingly like other property. We are by no means prepared to admit that imports, in the hands of the importer, discharged from the superintendence and claims of the United States, and incorporated into the mass of property there situate, are not proper subjects of state taxation, ratably with other property produced within the state. The business of the importer is not the business of the government, nor is he exempt from taxation by the states, because he pays to the revenue of the national government.

A right to tax the property, in proportion to the taxation of other property, may well consist with the denial in *Brown* v. *Maryland*, of any right in a state to raise a revenue by requiring importers to procure a license before they can sell. And this denial may be consistent with the assertion and admission of a right to require them to procure a license, without charge, before they are authorized to sell ardent spirits, if the same law applies to all venders and manufacturers. A person may be an importer, and yet a very un-

suitable person to be entrusted with the sale of an article liable to great abuse. But it is not necessary for us to discuss this topic. There is no danger to the powers of the government of the United States from this doctrine. On the contrary, it is that best calculated for their preservation, by preventing them from being pressed out of their proper sphere, and made the means of limiting the action of the states, in cases where that government has not attempted to interpose any objection to such action, and where, if the states cannot legislate, there is no remedy for the evil.

In a political system like that which exists in this country, where the powers of the different governments border so closely upon each other, being in many instances precisely similar in their nature, and often acting upon the same property, the line of division, where the power of the one ends, and that of the other begins, in relation to a particular subject-matter, can in some instances be determined, only by a consideration of the object, operation, and effect of the enactment. Its constitutionality must depend upon its real character, upon the end designed, and to be accomplished, and not upon its title or professions. If, under the general government, an act be ostensibly a regulation of foreign commerce, that will not give validity to provisions regarding in their effect, merely the internal police of the states. If under the state authority the end to be attained be merely a matter of internal police, the legislation will not be invalid because it may act upon articles of commerce. Will it be contended that a law forbidding sales of merchandise upon the Sabbath would be unconstitutional and void, so far as imported articles were concerned, even while they were in the hands of the importer, because it was a regulation of foreign commerce? We suppose not. If a state may act as to the time, it may as to the manner, of sales.

We believe, therefore, that the full exercise of the power of internal police, by the several states, is perfectly consistent with the most plenary exercise of all the powers of the United States, which have been supposed to conflict with the statute drawn in question in this case. If it be supposed that this police power may, remotely and indirectly, affect the action of that government in some particular, still there can be no conflict. As if, for instance, laws regulating the sale of liquors should diminish consumption, and thus cause a falling off of the revenue derived from that article. No act regulating the sale of liquors can possibly affect the revenue of the general government so as to impede its action, or impair the efficiency of its powers. It has at all times ample sources of revenue in other modes. Nor can such an act

affect its power to make treaties, or regulate commerce, for the reason already stated, that compacts and regulations of that character have regard to the introduction of the article into, or its exportation out of the country, and not to its sale within the states, after the importation is accomplished, and ended. These powers may have full scope and efficiency should every state in the Union prohibit the sale of spirituous liquors within their respective borders. The agreements and laws made under them do not stipulate for, or order sales, and have not, in all cases at least, the right so to do.

It will be no answer to this reasoning, to say that the states, if they may prohibit or regulate the sale of one article of commerce, may do the same as to all others, and that the action of the general government may therefore be rendered entirely nugatory, in relation to importations. Such is not the fact. The states can act only within the scope of the powers reserved. Should an attempt be made by a state to prohibit the sale of imported iron, or salt, or sugar, or cotton goods, within its limits, or to tax articles the produce of another state, beyond the rate of similar articles produced within its own borders, it would very readily be seen that such legislation was not a regulation of internal police merely, but that its design and its effect, if admitted, must be the regulation of foreign commerce, or commerce among the states, also. It would not have for its object merely the internal trade of the state, as such, but it would be an act relating to that trade, in its connection with a commerce beyond the limits of the state, with a view of affecting, and to some extent regulating, the latter also. One of the ends to be accomplished would be the limitation of such external commerce. Whether an act, professing to regulate merely the sale of such articles, would come within the same condemnation, must depend upon its particular provisions and operation, and the object to be accomplished by it. Should a state pass a law, requiring only the venders of spirituous liquors manufactured elsewhere to procure a license, the obvious object and effect of it would be to give a preference to the means of drunkenness produced within its own limits, and to exclude, as far as such a regulation might do, competition from abroad. It could not be regarded as a law intended to promote habits of temperance, and thus prevent the commission of crimes.

From what has been said, it will be seen that we regard the statute of July 4, 1838, as one of internal police. It was doubtless intended as a regulation of the internal trade of the state, in the particular specified, and such is its legitimate end and effect. One object to be effected by it must have been to place the trade in

liquors, where it existed, in the hands of suitable persons to be entrusted with such business; and another was, doubtless, by a diminution of the consumption of them, to prevent, in some measure, the manifold evils arising from intemperance, and to secure to the people the benefits to be derived from its suppression, so far as the act might have that effect. It is in collision with no treaty stipulations, nor has it anything to do with regulating foreign commerce, or that among the states. It raises no revenue here, nor could its object be to limit that of the United States. It does not forbid the introduction of anything into the state, or the use of any article here by him who purchases it elsewhere. It acts upon the sale of articles brought from other places, after they have become a component part of the mass of property in this state. It did so in the present instance. It is similar in its provisions to previous legislation, existing here ever since the formation of the present government, and long before that time, with the exception that it operates upon greater quantities, and may, therefore, include a very few more venders.

But the constitutionality of the law cannot depend upon the size of the cask, or the number of gallons it contains. The legislature may regulate the sale of large quantities as well as small — of fifty gallons, when brought from other places within the limits of the state, as well as of a single one. It does not prohibit sales in any quantities, but merely requires a license to authorize them. Incidentally, and indirectly, it may have a possible effect, in a limited degree, upon foreign commerce, and upon revenue, by lessening consumption, if licenses should be refused to any great extent, which, however, is not a necessary result from its provisions. But a decrease in the consumption of ardent spirits was not regarded by the authors of the Federalist as an evil. While suggesting that the article, under federal legislation, might be made to furnish a considerable revenue, they declared that if the proposed rate of duty "should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals and to the health of society." A state law, which has a tendency to produce these effects, may well be regarded as a matter of state police, and it would be a subject of great regret, if such a law should fall within the condemnation of the constitution of the United States. It will certainly be a very remarkable decision, which shall make a distinction, in regard to such laws, between liquors manufactured in the state, and those introduced from a foreign country, or another state; and it may be added,

that one which shall place the latter beyond the reach of such state legislation, must be disastrous in the extreme.

The course of reasoning which seems to be demanded by the position of the plaintiffs in error, if pursued, would deny all power in the states, at any time, to tax any article, or to provide any regulation respecting the safe keeping, or sale, of any article, imported from a foreign country, or from another state. If the importer had a right of sale exempted from state legislation, there must be a corresponding right of purchase, and it may certainly be said, with much appearance of plausibility, that if the importer have a right to sell, because he has imported, the party who purchases from him has an equal right to sell, or to put the article to the use for which it was designed, because he has purchased. The principle of a rule, which should confine the exemption from state authority to sales by the package in which the article is imported, is not readily perceived, for the article may have become mixed up with, and a part of, the mass of property in the state, while in the original package, in the hands of the importer. But if such rule be admitted it will be easy to enlarge the exemption, by diminishing the size of the package ; and if the law now in question should be held unconstitutional, it would not require the lapse of another half century, to raise the argument that all state legislation respecting ardent spirits, lottery tickets, gunpowder, bowie-knives, &c., must be confined to such of the articles as are manufactured within the state enacting the laws. The vender of lottery tickets, in a lottery authorized by the laws of another state, will allege that he purchased in that state where the article was lawfully sold as property, that he brought and sold them in the same package in which he purchased, and that he is not therefore amenable to laws which regard his traffic as demoralizing, and impose a penalty upon the sale of such tickets. The purchaser from him will rely upon the authority of congress to regulate commerce among the states, to justify himself in disposing of whatever he has purchased, having by his purchase acquired a right to sell also. And the same reasoning which shall give to the importer of ardent spirits the right to sell, and the purchaser from him a right to resell, or to use, without the imposition of restrictions by state authority, (because such restrictions interfere with commerce and tend to diminish importation,) must put the traffic of the importer of Chinese crackers beyond the pale of state legislation, and perhaps give to the boys, who purchase his wares, a constitutional right to fire them in the streets, and set city ordinances at defiance. Whether it may not also be contended that penalties upon drunkenness, and

divorces for habitual intemperance, must be confined to cases where the intoxication is caused by liquor manufactured within the state, remains to be seen.

We have considered the statute in question, as it truly is, a law regulating the sale. It is not a statute of prohibition. The fact that the tribunal having the authority to license, in a town, may, in the exercise of its discretion, refuse to grant any within that town, does not change its character. Laws, requiring hawkers and pedlars to procure a license, are not laws prohibiting sales in that mode; notwithstanding, licenses may be refused. But if this were a law prohibiting the sale entirely, we are not prepared to say that it would not still be a constitutional exercise of the legislative power of the state. With the most profound respect for the opinions of the late venerable, and very learned chief justice of the United States, we cannot concur in an incidental remark, found in *Brown* v. *Maryland*, that "there is no difference in effect between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country." If the sale be prohibited, it may, notwithstanding, be introduced for use by the person importing; for export to another country, or for the purpose of being sent to another state and sold there if a sale there be lawful. And we may further remark, that the force of the reasoning in the dissenting opinion of another very learned judge, in that case, must confine the authority of the case to the precise point in issue.

We have already admitted that the states may be restrained, in general, from prohibiting the sale of articles imported. They cannot do so against the legislation of congress, by virtue of any rights reserved to them. The prohibition, under whatever pretence, would be in effect a regulation of external commerce. But in those cases where the sale of the article has been, and may yet be, regulated as a mere matter of police, for the promotion of the safety, prosperity, and happiness of the people, it is by no means clear that if regulation shall not be found effectual to accomplish the object designed, even prohibition may not be resorted to, without any conflict with the powers of the national government.

Supreme Court of Indiana, May Term, 1845.

ROCELIA *v.* FOLLOW.

The charge that one is forsworn, is not of itself actionable. A count in a declaration in slander, should, in addition to the *inducement* and *colloquium*, contain the *innuendo* which is always necessary in such cases to explain the defendant's meaning by reference to the previous matter. (*Indiana State Journal.*)

Supreme Court of Vermont, Windsor County, February Term, 1845.

THOMAS S. GORDON *v.* BENJAMIN POTTER.

A parent is not liable for necessaries furnished his minor child, unless it be by his authority, either express or implied.

If he abandon his child to want, the public authorities may interfere and compel him to furnish a suitable maintenance, but strangers cannot do this at the expense of the parent.

THE opinion of the court, in this case, was delivered by

REDFIELD, J. This case presents the question how far a parent is liable for necessaries furnished his minor child. The report of the auditor, which is the basis of the judgment below, which we are now revising, seems to leave the case defective in many particulars, as against the father. It does not appear, except by way of inference, that the articles charged were furnished upon the credit of the father, or in other words, that the plaintiff, at the time they were delivered the son, expected the father to pay for them. And I take it to be well settled law, that if one trades with the son, and gives credit to him alone, knowing all the facts in the case, he can never, after that, sustain an action against the father for articles thus delivered. And this is upon the ground, that if one trade with the agent, and give credit to him personally, knowing of his agency, the principal is not liable.

But there is one defect in the case, which we think must clearly, and indisputably, preclude any recovery against the father. It does not appear that the father ever gave the son any authority, either expressly, or by implication, to pledge his credit for the articles; but the contrary. And unless the father can be made liable for necessaries, for his infant child, against his own will, then in this case, the plaintiff must fail to recover. I know there are some cases, and *dicta* of judges, or of elementary writers, which seem to justify the conclusion, that the parent may be made liable for necessaries for his child, even against his own will. But an examination of all the cases upon this subject, will not justify any such conclusion. Chancellor Kent, (2 Com. 191,) says, "During the minority of the child, the parent is absolutely bound to provide reasonably for its maintenance and education, and he may be sued for necessaries furnished, and schooling given to a child, under just and reasonable circumstances." Ch. J. Swift, (1 Dig. 41,) uses much the same language. None of the cases referred to by

these writers, justify the language used. *Van Valkinburgh* v. *Watson*, (13 Johns. R. 480,) is relied upon by both these writers to sustain their position. But the decision in that case was in favor of the father. The court say, indeed, that had he absolutely refused to furnish necessaries to his minor child, he might be made liable for them, when furnished by a stranger. But the decision involved no such question, and called for no such declaration. Chancellor Kent refers to *Stanton* v. *Wilson*, (3 Day, 37,) which, although a Connecticut case, is not adverted to by Ch. J. Swift, from which we conclude he did not esteem it in point. The rule laid down in this last case, is broad enough to make the father liable, against his will. "When an infant child elopes (?) from his father for fear of personal violence and abuse, and cannot with safety live with him, the father is liable for necessary support and education, furnished to such child by a stranger." But the case before the court was, where the necessaries had been furnished the child by consent of the legally constituted guardian, the mother, after a divorce *a vinculo*. Chancellor Kent also refers to *Simpson* v. *Robertson*, (1 Esp. Cas. 17.) But this case merely decides, that the father is not liable for articles of clothing furnished the son by a tailor "who colludes with the son, and furnishes him with clothing to an extravagant degree. *Ford* v. *Fothergill*, (*Id.* 211) is also referred to by Chancellor Kent. But this was a case *against the son*, and the only question moved in the case was as to the extent of the liability of an infant for necessaries. *Stone* v. *Carr*, (3 Esp. Cas. 1,) is likewise referred to by Chancellor Kent. This can only determine the extent of one's liability for necessaries furnished his wife's children, by a former husband, when they form a portion of his family. No other authorities are referred to, and it is presumed none other exist, or they would not have been overlooked by such an indefatigable reviser as the learned Chancellor, whose opinions are in our American courts, deemed law, and are sought with almost equal avidity by the proprietors of railroads, and by the impeachers of presidents. But notwithstanding the usual accuracy of the learned commentators referred to, it needs no further argument to show, that their opinion, on this point, is without the support of any decided case.

An examination of the English cases, upon this point, will show, that the parent cannot be made liable for necessaries, furnished his child, without his consent, either express, or implied. The case of *Bainbridge* v. *Pickering*, (2 W. Black. R. 1325,) is the same almost, as that already quoted from 13 Johns. R. 480. But the opinion of the court shows more the sense of the English courts,

upon the important matter of family government. Guild J. says, "No man shall take upon him to dictate to a parent, what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father and mother." In the case of *Baker* v. *Keen* (3 Eng. C. L. R. 449; 2 Starkie, 501,) which was tried before the late Lord Tenterden, then Ch. J. Abbott, it was held, that when a minor "orders articles which are necessary to his condition in life, it is a question for the jury, under all the circumstances in the case, whether they can infer an authority given to that effect by the father." The Lord Chief Justice says, "A father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied." In *Hack* v. *Tollemache*, (11 Eng. C. L. R. 296; 1 Car. & P. 5,) it is held, that "a father is not bound to pay for clothing furnished his son, without some contract, express or implied, on his part, to do so." Borrough, J. says, "An action can only be maintained against a person for clothes, supplied to his son, either when he has ordered such clothes, and contracted to pay for them, or when they have been at first supplied without his knowledge, and he has adopted the contract afterwards." *Rolfe* v. *Abbott* is to the same point, (25 Eng. C. L. R. 400; 6 Car. & P. 286.) Baron Gurney told the jury, that, "to charge the father, it is essential that the goods should have been supplied with his assent, or by his authority." In *Law* v. *Wilkin*, 33 Eng. C. L. R. 193; 6 Adol. & El. 718) the same rule is confirmed, although a new trial is there granted, upon the ground that the case should have been submitted to the jury. From which we conclude such is the acknowledged rule of law in Westminster Hall, or so many of the judges would not be found so unanimous in declaring it. And it is obvious, that it makes no provision for strangers to furnish children with necessaries, against the will of the parents, even in extreme cases. For if it can be done in extreme cases, it can in every case, where the necessity exists, and the right of a parent to control his own child will depend altogether upon his furnishing necessaries, suitable to the varying taste of the times. There is no stopping-place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and in the mode pointed out by statute, compel a proper maintenance. But this, according to the English common law, which prevails in this state, is not the right of every intermeddling stranger.

The following English cases serve to show still more clearly,

the opinion entertained there upon this subject, than the earlier cases. *Blackburn* v. *Mackey*, (1 Car & P. 1; 11 Eng. Com. L. R. 295,) decides that "a father is not liable for clothes furnished his son, though under age, without some proof of a contract on his part, either express or implied." The proof in that case was, that the son was in want of clothes, and his father did not furnish him with any, or with money, and he obtained them of the plaintiff. Abbott, Ch. J. says, "The question deeply affects society; for if persons in trade are allowed to trust young men, and compel their fathers to pay them, any man, who had a family, might be ruined. A father is not bound to pay for articles ordered by his son, unless the father gives some authority, express or implied." In *Seaborne* v. *Maddy*, (9 Car. & P. 497; 38 Eng. Com. L. R. 194,) it is decided, that "no one is bound to pay another for maintaining his children, unless he has entered into some contract to do so. Every man is to maintain his own children, as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action." This was as late as 1840, before Mr. Baron Parke. In a note to this case, I find a report of the case of *Mortimore* v. *Wright*, from the London Law Journal, vol. 9, Exchcq. p. 158, in which it was decided, in the exchequer chamber, upon writ of error, that a father is not liable for debts incurred by his son, while under age, unless he has given an authority to the son to incur them, or has contracted to pay them; and that the moral obligation he is under to support his children infers no such liability. In that case Lord Abinger, Ch. B. said; "In point of law, a father, who gives no authority and enters into no contract, is not liable for goods supplied to his son, any more than an uncle, a brother, or a stranger would be. The mere moral obligation upon a father to maintain his child (which I by no means deny,) affords no inference of a promise to do so. In order to bind a father for a debt incurred by his son, you must prove that he has contracted to be bound, in the same manner you would prove such a contract against any other person; and it ought not to be left to juries to make the law in each particular case, according to their own feelings or prejudices." Baron Parke says, "It is a clear principle that a father is not under any legal obligation to pay his son's debts, unless he has contracted so to do, except, perhaps under the 43 Eliz., under which he may, under certain circumstances, be compelled to support his children according to his ability. A mere moral obligation can impose upon him no such legal liability."

In this case all the former cases are elaborately reviewed, and many of them limited and qualified, and the foregoing may be con-

sidered the settled law in Westminster Hall so late as 1840. It need not be remarked how precisely it corresponds with the view we had taken of what the law was, and what it should be. The laws are made and administered by young men, far more in this country than in England, but it is to be hoped that will not induce us to depart from so salutary a rule of law, as giving the father the control of his own household and property. There is full enough disposition of late to subject fathers to the caprices or the excesses and extravagance, if not the domination of thoughtless and heartless sons, in concurrence with others, who subsist by deluding and destroying sons, who might otherwise be sober and decent. One could hardly desire to see the tendencies in that direction increased. A father who supports his family, ought, it would seem, to be consulted as to the mode in which it shall be done; and, if he will not support them, "being of ability," the statute points out the remedy, the same in this state as in England. I know the law is different as to the wife, and there are substantial reasons why it should be. She may always buy necessaries on her husband's credit, if he turn her off, without her fault, or refuse to find her a suitable maintenance at home.

Judgment affirmed.

Supreme Judicial Court of Maine, Hancock County, July Term, 1845.

BUCK, ET AL., IN EQUITY, *v.* PROPRIETORS OF TOWNSHIP NO 1, OR BUCKSPORT.

Where the proprietors, under a grant of a township, divided the lots between them by draft, and one proprietor drew a lot for his portion, a part of which was located without the boundaries of the grant, which fact was not known at the time of the draft; and that proprietor conveyed the lot to a third person, that third person to the plaintiff, and the plaintiff to a fourth person, who was evicted, and recovered damages of the plaintiff for such eviction; it was *held*, that these facts did not give the court jurisdiction of a bill in equity, brought by the plaintiff against the proprietors of the township, notwithstanding there remained undivided property belonging to them, more than sufficient to indemnify them.

THIS was a bill in equity, in which the plaintiffs allege that on the 3d of March, 1762, the legislature of Massachusetts granted unto David Marsh and others the Township No. 1, which grant was

confirmed on the 8th of July, 1786; that, soon after, the grantees were duly organized, and have continued to act as a corporation, and have caused that township to be run out into lots, and, at sundry times, have caused drafts to be made of the same among the proprietors, &c. They further allege, that on the 17th December, 1801, at a meeting of said proprietors, a draft of sundry lots was made among themselves, and lot No. 196 was drawn by Enoch Noyes, one of the original proprietors, who afterwards conveyed the same to Jonathan Buck, and he, subsequently, to the plaintiffs. And the plaintiffs, believing the title to be good, and that the location of the township, made previous to December 17, 1801, was in strict conformity to the original grant, conveyed the lot No. 196 to one Thomas Hodges, by a deed with the usual covenants of warranty; that afterwards, in a suit brought by one Heaton against Hodges, the demandant, in June, 1837, recovered judgment for sixty acres, part and parcel of said lot, upon the ground that the same was not embraced in the original grant; and that in consequence thereof, and of their said warranty, the plaintiffs have been obliged to pay a large sum of money to Hodges. The plaintiffs further allege that there remains undivided property, in money and lands, belonging to the proprietors, more than sufficient to indemnify them for the loss of the said land. They conclude with a prayer that the court may award and decree such relief in the premises as to them may seem just and equitable.

To which bill the defendants demurred generally.

Abbott and *Pond*, for the plaintiffs.
Kent and *Woodman*, for the defendants.

By the Court. We have examined the papers in this case, and are of opinion that the mistake, upon which the bill is grounded, is not such an one as was contemplated by the statute, giving this court jurisdiction in equity in cases of mistake. The remedy of the plaintiffs, if they have any, is, perhaps, by obtaining a new partition, if the lapse of time and situation of the property is not such as to preclude that remedy. The bill must be dismissed.

Supreme Court of Ohio, April, 1845, at Cincinnati.

THE STATE *v.* CARVER.

The State has no peremptory challenge in a capital case. (*Western Law Journal.*)

Digest of American Cases.

Selections from 6 Metcalf's (Massachusetts) Reports.

ACTION.

1. A. sued B, and summoned C. as trustee of B.: A., B. and C. afterwards made a tripartite agreement, in which it was stipulated that the respective demands of B. and C. should be submitted to referees, who should determine the amount due from C. to B.; that C. should not make his disclosure in the trustee process, until after the referees should make their award; and that if the referees should determine that C. was indebted to B., C. should disclose, or become charged, as trustee of B., to the amount which the referees should determine to be due from him to B.; and that C. should be discharged from said process, if the referees should determine that he was not indebted to B.: The referees determined that C. was indebted to B. in a certain sum; but C. neglected to make his disclosure in the trustee process, until after B.'s estate had been assigned under the insolvent law of 1838; and on his subsequently making his disclosure, he was discharged, because the assignment of B.'s estate had dissolved the attachment, made of B.'s debt, by said process: A. afterwards sued C. for breach of the aforesaid agreement, in not making a seasonable disclosure in said process, and recovered judgment against him for the amount which the referees determined to be due from him to B.; and C. satisfied that judgment: The assignee of C., appointed under the insolvent law, afterwards brought an action against C. to recover the aforesaid amount. *Held*, that the action could not be maintained; B. himself having no right of action against C., when his estate was assigned. *Caldwell* v. *Rice* 493.

2. The holder of a post note, which was issued by a bank that failed before the note fell due, sent it to another bank for collection, and this bank caused payment to be demanded, and notice of nonpayment to be given to the indorsers, on the day the note was due, without grace, whereby the indorsers were discharged on the ground that by law the promisors were entitled to grace on the note, although they had, while solvent, paid such notes without grace: The holder thereupon brought an action against the collecting bank to recover damages for negligence in not making such demand and giving such notice as would hold the indorsers: It appeared, on the trial, that at the time when the note fell due, the question whether banks were entitled to grace on their post notes, had never been decided, and that there was no uniform practice, as to demanding payment of such notes, and of giving notice to the indorsers, after the promisors failed. *Held*, that the action could not be maintained. *Mecanics Bank* v. *Merchants Bank*, 13.

3. A deputy sheriff, having attached goods, in a suit brought by F. against M., sold them on mesne process, pursuant to the Rev. Sts. *c.* 90, § 57, and held the proceeds: M. died, and his administratrix and F., and A., a creditor of F., executed an indenture, in which it was agreed that said deputy should pay (and he was therein directed and requested to pay) part of said proceeds to M.'s administratrix, and the residue to A., and that F.'s suit against M. should be dismissed: The deputy paid M.'s administratrix accordingly, and made part payment to A., and said suit was dismissed; but he neglected to pay A. in full: M.'s administratrix thereupon sued the sheriff for the deputy's default in not paying over the balance of said proceeds. *Held*, that the sher-

iff was answerable to her for this default of the deputy. *Mansfield* v. *Sumner*, 94.

ADMINISTRATOR.

1. An administrator is bound to answer, on oath, as to all facts tending to show that he was indebted to the intestate; even as to the facts that take the intestate's claim out of the operation of the statute of limitations, though it is apparently barred by that statute. *Sigourney* v. *Wetherell*, 553.

2. Where the estate of a testator was in the hands of his widow and executrix, from the time of the probate of the will until her disease, and she, while she remained sole, rendered several accounts of her administration, and, after her second marriage, she and her husband, in her right, rendered other accounts, all of which were allowed, but it did not appear that any person, interested in the ultimate disposition of the property, was present or was represented when they were allowed; it was held that the judge of probate had authority to open all those accounts, and correct them, upon the coming in of the final account of the executrix, as made up by her last husband, after her decease, on objections being made thereto by the administrator *de bonis non* of the testator, appointed after the death of the executrix. *Wiggin* v. *Swett*, 194.

3. Where a testator devised to his wife, whom he appointed executrix, the use of his dwelling-house for life, and directed that it should be kept in repair out of his other estate, it was held that she might charge the estate, in her administration accounts, with the amount of premiums paid by her for insurance of the house against fire; but not for the taxes assessed on the house while in her possession under the will. *Ib.*

4. An administrator, who has in his hands a distributive share of his intestate's estate, which belongs to an insolvent debtor, cannot withold it from the debtor's assignee, for the purpose of paying himself, by way of set-off, a debt due to him in his own right, from such debtor. *Davis* v. *Newton*, 537.

ADVERSE POSSESSION.

Where one enters upon land, claiming title, though under a parol gift only, and holds exclusive possession, such possession is adverse, and, if continued twenty years, bars the owner's right of entry and of action. *Sumner* v. *Stevens*, 337.

AMENDMENT.

Where a nonsuit is taken off, and a new trial granted, the plaintiff may have leave to amend his declaration, though he did not move to amend before the nonsuit was entered. *Medbury* v. *Watson*, 246.

ANNUITY.

1. Where an annuity is given by will, with a drection that it be paid quarter yearly, the first payment is to be made at the end of three months after the testator's death. *Wiggin* v. *Swett*, 194.

2. Where a testator, among other bequests to his wife, gave her an annuity of $800, "during the full term of her life, to be paid to her quarter yearly," and payments were accordingly made to her for several years, and she died three days before the expiration of a quarter; it was held that the annuity could not be apportioned, and that her representatives were not entitled to receive a *pro ratâ* payment. *Ib.*

ARBITRAMENT AND AWARD.

1. Arbitrators have authority to decide conclusively all questions of law necessary to the decision of the matters submitted to them, unless they are restricted by the terms of the submission, or unless it appears on the face of their award, that they intended to decide according to law, but have decided contrary to law: And there is no distinction, in this respect, between the authority of arbitrators who are selected from the legal profession, and that of other arbitrators. *Boston Water Power Company* v. *Gray*, 131.

2. The decision of arbitrators, to whom all questions of fact and law are submitted, and who act fairly, is conclusive, unless it can be impeached and avoided by proof of fraud practised on them, or proof of mistake or accident, by which they were deceived and misled, so that their award is not in fact the result of their judgment: But their mis-

takes in drawing conclusions of fact from evidence or observation, or in adopting erroneous rules of law or theories of philosophy, are not a legal cause for avoiding their award. *Ib.*

3. Hence, where a question as to the measure of a water power, granted by demise, was submitted to arbitrators, and they, after making numerous actual experiments, constructed a table, on hydraulic principles, by which the use of the water was to be calculated; it was *held*, that evidence was not admissible to show that the table was constructed on erroneous principles. *Ib.*

4. The owners of the water powers at the Boston Mill Dam leased a certain number of mill powers, with an agreement that they would do nothing whereby the power granted might in any way be in any wise defeated or diminished: Disputes afterwards arose respecting the quantities of water to which the lessee was entitled, and as to the mode of measuring and delivering the same, and the use thereof; whereupon the parties submitted the matters in dispute to arbitrators, authorizing them (among other things) to determine what quantities of water the lesse was entitled to draw, by virtue of his lease, and also to determine the manner in which the same should be measured and delivered, and to settle, in all other particulars, the legal rights of the parties under and by virtue of the lease, and to employ such engineers, agents, &c. as they should see fit, for the purpose of enabling them to determine the extent of the water power, and other experimental matters incident to the business committed to them, and to determine what part of the expenses appertaining thereto should be borne by each party. *Held*, that the arbitrators had not exceeded their authority by awarding that the lessee should take the water at a lower level than that at which it was taken at the time when the lease was made; nor by awarding that the lessee should pay half of the expense of an apparatus which they ordered to be made and set up for measuring the water to be received by the lessee, and half the expense of the experiments made by the arbitrators to determine the whole number of mill powers which the lessors owned; nor by awarding that the water received by the lessee should be measured after it had passed his mills, and not before. *Held also*, that the arbitrators had not exceeded their authority by awarding that the lessors should remove accretions from the basin that received the water, whenever it should be necessary to the full enjoyment of the water powers granted to the lessee, although the lessors might not own the soil; the arbitrators being of opinion, that the lessors had the right, and were bound to enter upon the receiving basin, and remove therefrom obstructions arising from accretions. *Held further*, that the arbitrators, by awarding that the lessee was entitled to the use and enjoyment of his mill powers "so long as the basins will furnish the same," had not, by implication, impaired his rights under the lease, which gave him such powers absolutely, and without any limitation. *Ib.*

5. Where arbitrators, under the submission prescribed by the Rev. Sts. *c.* 114, do not set forth in their award, their doings, and the result thereof, but refer in their award, to statements of their proceedings, which they have delivered to the parties, the award cannot legally be accepted and confirmed. *Day* v. *Laflin*, 280.

6. And if such arbitrators, instead of awarding that one party shall recover any sum against the other, indorse a certain sum on a note held by one of the parties against the other, and direct that the note, thus reduced by the indorsement thereon, shall be held by the payee as their award; such award cannot be accepted and made the ground of a judgment. *Ib.*

7. In an action on a bond for the performance by a third person, of an award to be made on a submission under the Rev. Sts. *c.* 114, the obligor may defend by showing that the award is void, although the court, to which it was returned, accepted and confirmed it, and rendered a judgment thereon, which is not reversed. *Laflin* v. *Field*, 287.

ASSUMPSIT.

1. S. subscribed a paper, with others, promising to pay $100 for erecting and endowing an academy, "each subscriber to be interested therein in proportion to the amount by him subscribed," and engaging to pay the same to such per-

son or persons as might be appointed by a majority in interest, to receive it, and agreeing that when such majority should deem it proper, they might call a meeting of the subscribers, who might choose officers and committees, give them instructions, and pass votes concerning the building, location and endowment of the academy: S. afterwards joined others, who had subscribed the paper, in a petition to the legislature, stating that sufficient funds had been raised for building and endowing an academy, and praying to be incorporated as an academy; which petition was granted, and an act of incorporation passed: There were then no other funds besides the sums thus subscribed: Afterwards, and after the subscription was filled, a meeting of the subscribers was called, and was twice adjourned: At the first meeting, A., B. and C. were chosen a building committee, and were instructed to "submit their views and doings in relation to procuring the most eligible location" for the building, and the terms on which a site could be obtained: At the first adjourned meeting, said committee were authorized forthwith to make such contracts as might be necessary for procuring materials for the erection of a building, and a site for the same was agreed upon, and A., B. and C. were appointed and authorized to collect of the several subscribers the sums subscribed by them: At the second adjourned meeting, an unsuccessful attempt was made to change the site before agreed upon: Said committee proceeded to make a contract for building, purchased the site agreed upon, and took a conveyance thereof; and the building was erected: S. attended all said meetings, and voted as one of the associate subscribers: At the first adjourned meeting, S. declared, in presence of said committee, that "if the location agreed on should be persisted in," he would not pay his subscription; and afterwards, and after said committee had purchased said site, and made the contract aforesaid, S. gave them written notice, that "if the course which had been commenced should be pursued," he should not feel bound nor disposed to pay his subscription. *Held*, that S. was legally bound to pay the sum subscribed by him, and that A., B. and C. might maintain an action against him to recover the same. *Ives* v. *Sterling*, 310.

2. It is no defence to an action brought to recover money subscribed for the building and endowment of an academy, that the committee appointed by the subscribers to purchase land for the sight thereof, have taken a deed which does not convey a fee, or which is on a condition that is burdensome to the grantees. *Ib.*

3. A. fraudulently sold and conveyed B.'s land to C., under a power of attorney from B., C. knowing the fraud: B. died without knowledge of the sale, and C. afterwards conveyed the land to A., who sold and conveyed it to purchasers, who paid him therefor, they having no knowledge of the original fraud. *Held*, that B.'s heirs could not maintain an action for money had and received against A., to recover the proceeds of the land. *Brigham* v. *Winchester*, 460.

4. Where A. received of B. $275, "to buy flour," and took of C. a receipt for $300, "towards 100 barrels of flour, at $4 per barrel," without any delivery of the flour, actual or constructive, and there was no proof that such inchoate purchase from C. was intended, at the time, as a purchase on account of B., and B. never received any flour purchased by A.; it was held that B. might recover back from A. the $275, in an action for money had and received. *Strong* v. *Bliss*, 293.

5. Where money is lent on the credit of the borrower, though a third person, debtor of the borrower, signs a promissory note for the amount of the money, and the lender receives the note, yet if such note is not paid when due, he may maintain an action against the borrower for money lent. *Marston* v. *Boynton*, 127.

ATTACHMENT.

An assignment of a debtor's property, under the insolvent act, (*St.* 1838, *c.* 163,) does not dissolve an attachment thereof, which was made before the passing of the act. *Kilborn* v. *Lyman*, 299.

CORPORATION.

After a verdict in favor of plaintiffs, who sue as a corporation, the court will presume that the fact of their being a

corporation, and capable of suing in their aggregate capacity, was conceded or proved at the trial. *British American Land Co.* v. *Ames*, 391.

COVENANT.

Where a party enters on woodland, claiming title, and cuts wood and does other acts thereon, as owner, and no other person enters into possession or disputes his title, he thereby becomes seized of the land, as against every one but the true owner, though his acts do not constitute a disseizin of such owner; and if he conveys the land by deed, his possessory title passes to his grantee, and the covenant of warranty, in such deed, runs with the land, and he is answerable thereon to his grantee's assignee, who is ousted by the true owner. *Slater* v. *Rawson*, 439.

DAMAGES.

Where a party who has agreed to convey land, for a certain sum, to a railroad corporation, for the site of a road, refuses to perform his agreement, and obtains an assessment, according to law, of his damages caused by the laying out of the road over his land, the measure of the damages, to which he is liable for breach of his agreement, is the excess of the sum assessed at law over the sum for which he agreed to convey the land. *Western Railroad Corporation* v. *Babcock*, 346.

DECEIT.

1. Where one is deceived in the purchase of property, by the false affirmations of a third person, and is thereby induced to pay more for the property than it is worth, the party by whom he was thus deceived cannot defend against an action brought by the purchaser to recover damages for the deceit, by showing that the plaintiff sold the property for the same sum which he paid for it. *Medbury* v. *Watson*, 246.

2. It seems that an allegation, that L. falsely and deceitfully represented himself to the inhabitants of the town of W., that he was an agent of the town of D., duly authorized to make an agreement with the town of W. for the repair of a bridge which divided the two towns, is not supported by proof that L., as one of the selectmen of D., met the selectmen of W. and joined with them in an agreement with a third person to repair such bridge. *Inhabitants of Webster* v. *Larned*, 522.

3. In an action by the town of W. against L., the declaration alleged that L. falsely and deceitfully represented to the plaintiffs that he was the agent of the town of D., and duly authorized to agree with the plaintiffs to repair a bridge across a stream which divided the said towns of W. and D., at the joint expense of said towns; and that the plaintiffs, relying on such representation, together with L., jointly employed S., as their agent, to repair said bridge, and agreed that they would jointly and equally pay him the expense of repairing it; that S. repaired the bridge, and demanded payment thereof of the plaintiffs, who paid him, and afterwards demanded of said town of D. to repay them one half of the sum thus paid to S., which said town refused to do, alleging that L. was never authorized to act as their agent in causing the bridge to be repaired: The declaration further averred, that L. was not in fact, authorized by the town of D., as he represented himself to be; that the plaintiffs had been deceived and injured by his false and deceitful representation, and that he was answerable to them for the injury so caused: The evidence to support this declaration was, that L. and two of the selectmen of W. contracted with S. to repair the bridge, at the joint and equal expense of the two towns, and that this (if any) was the only act by which L. assumed an authority to bind the town of D. *Held*, that if this was a representation that he had authority to bind said town, it was a representation made to S. and not to the town of W. *Ib.*

DEED.

1. B., after adding a small piece of woodland to a farm, which he had long owned and lived upon, made a mortgage of his farm to S., in these terms: "My home farm, containing 70 acres more or less," but so described by metes and bounds, as to exclude said woodland: He afterwards made a conveyance of his lands, and all his personal property, to assignees, in trust, viz. that they

should reduce the property to money, and therewith pay his creditors in full, if the proceeds of said property should be sufficient, and, if not sufficient, to pay them ratably, in proportion to the amount of their several claims: In this conveyance to assignees, the only description of his lands, which could include the woodland, was this: "The farm whereon I live, containing about 70 acres, which estate is now under a mortgage to S." *Held*, that the woodland had passed to the assignees. *Wheeler* v. *Randall*, 529.

2. A deed conveying land, executed by an insane person, is voidable only, and not void, and may therefore be ratified by him when he is of sane mind. And this doctrine applies as well to unrecorded deeds as to feoffments and to deeds recorded. *Allis* v. *Billings*, 415.

3. Where an agreement by deed is made with a corporation, and is delivered to an agent of the corporation, who was duly authorized to negotiate it, it is delivered to the corporation, and his acceptance thereof is the acceptance of the corporation. *Western Railroad Corporation* v. *Babcock*, 346.

4. After a parish has accepted a parol gift of a tract of land for the site of a meeting-house, and had erected such house thereon, and sold the pews, in the usual manner, to individuals, and done other acts indicating that the control of the house was in the parish at large, the heirs at law of the donor of the land conveyed the same to the deacons of the church connected with the parish, upon the trust and condition that they and their successors in office, should permit the proprietors of the pews in the meeting-house then erected, or that might thereafter be erected, on said land, forever to occupy, hold, use and enjoy said land, and the meeting-house then thereon, or that might be thereafter built thereon, for the purpose of maintaining public worship in said house, and for all religious and parochial uses and occasions, and for all usual purposes, or purposes deemed proper by the proprietors of said pews. *Held*, that this conveyance did not confer on the proprietors of pews the right of electing the minister who should officiate in the meeting-house, but that such right was left in the parish at lage. *Wood* v. *Cushing*, 448.

DEPOSITION.

1. When a deponent, after giving his deposition to be used in the trial of an action pending, or immediately to be commenced in good faith, becomes interested in the event of the suit, by no act of his own, or of the party who offers his testimony, his deposition is admissible. *Sabine* v. *Strong*, 270.

2. When a deposition is taken out of the state, on a commission, and the commissioner states, in his certificate of the caption, that the directions accompanying the commission have been complied with, the deposition will not be rejected merely because some of the answers of the deponent lead to the belief that he had, before he answered certain interrogatories, read previous ones. *Ib.*

3. The deposition of a witness, who was out of the commonwealth, was taken under a commission from the court to be used by a plaintiff in an action on a promissory note, and the interrogatory put by the plaintiff to the witness was, whether he signed his name as an attesting witness to the note in suit, and the answer of the witness was, that he had no recollection of seeing the note executed, or of signing his name thereto, as attesting witness, although he might so have done. *Held*, that by a reasonable implication, it must be understood from the answer, that the attestation to the note was in the handwriting of the witness; but that if this was left doubtful on the answer, the plaintiff might introduce other evidence of the hand-writing both of the attesting witness to the note and of the promisor. *Walker* v. *Warfield*, 466.

DISSEIZIN.

Where several persons, without privity of estate, successively enter on land as disseizors, their several possessions cannot be tacked so as to make a continuity of disseizen of sufficient length to bar the owner's right of entry. *Wade* v. *Lindsey*, 407.

DISSEIZOR AND DISSEIZEE.

Where a disseizee, whose right of entry, but not his right of action, is barred by the statute of limitations, makes entry upon the land, and retains possession, he does not thereby forfeit his right of action; and, therefore, if he is sued

in a writ of entry, by the disseizor whom he has ousted, he may, to prevent circuity of action, set up his ancient title, in defence, by way of estoppel or rebutter. And though the disseizee, in such case, was originally owner of only part of the land, as one of several tenants in common, and received a conveyance of his contenants' shares thereof, while they and he were disseized, yet he may maintain his defence to the possession of the whole. *Wade* v. *Lindsey*, 407.

DOWER.

1. A. conveyed land to B., who entered into possession, and afterwards reconveyed the land to A.; but neither of the deeds of conveyance was ever recorded: A. afterwards conveyed the land to C., who had no knowledge that B. ever owned it. *Held*, that as against C., B. had not such a seizin of the land as entitled his widow to maintain a writ of dower against C. *Emerson* v. *Harris*, 475.

2. If a demandant in a writ of dower dies after she recovers judgment for her dower, but before dower is set out to her, the action dies with her, and judgment for damages for the detention of dower cannot be rendered as of a former term. *Atkins* v. *Yeomans*, 438.

EQUITY.

1. A town passed a vote to refund to its selectmen the expense they might incur in defence of a suit brought against them for a violation of their official duty respecting elections, and directed its treasurer to pay money to the counsel employed by the selectmen to defend such suit. A minority of the voters thereupon filed a bill in equity, praying that the officers of the town might be restrained, by injunction, from carrying such vote and direction into effect. *Held*, that the equity jurisdiction of the court did not extend to this case. *Hale* v. *Cushman*, 425.

2. It is a good defence to a bill in equity, praying for a specific performance of an agreement to convey land, that the defendant was led into a mistake, without any gross laches of his own, by an uncertainty or obscurity in the descriptive part of the agreement, so that the agreement applied to a different subject from that which he understood at the time; or that the bargain was hard, unequal or oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed: But in such case, the burden of proof is on the defendant to show such mistake on his part, or some misrepresentation on the part of the plaintiff. *Western Railroad Corporation* v. *Babcock*, 346.

3. Where a party agrees, for a certain consideration, to permit a railroad corporation to construct a road over his land, on any one of two or more routes, at their option, and to convey the land to the corporation, for certain sums, according to the route that shall be taken, after the road shall be definitely located, he cannot defend against a bill for specific performance of his agreement, by showing that he was induced to believe, either by his own notions, or by the representations of third persons, as to the preference of one route over another, that the corporation would select a route different from that which they finally adopted; nor by showing that the corporation or its agents made representations as to the probability that one route would be adopted in preference to another, or as to the relative advantages of each route. *Ib.*

4. Where a party agrees under seal to permit a railroad corporation to construct a road over his land, and also agrees to convey his land to the corporation for a certain sum, after the road shall be definitely located, with a condition in the deed of conveyance that the deed shall be void when the road shall cease or be discontinued; specific performance of such agreement may be decreed, after the road is constructed over the land, although the corporation did not expressly bind itself to take or to pay for the land: And where, in such case, the corporation takes the land, constructs a road over it, and is, for three or four years, in actual possession and use of all the privileges which the performance of the party's agreement would give, and then files a bill against him for specific performance of his agreement, the bill will not be dismissed on the ground of unreasonable delay in filing it. *Ib.*

5. In order to prevent a decree for specific performance of a contract, on

the ground of inadequacy of consideration, the inadequacy must be so gross, and the proof of it so clear, as to lead to a reasonable conclusion of fraud or mistake. *Ib.*

6. The husband of a tenant in common of land joined his wife in an agreement with C., the cotenant, that a building should be erected on the land, that C. should advance the money required for that purpose, and that the wife's portion of the land should be mortgaged to C. by her and her husband, to secure payment of the money to be advanced by him for the wife: C. advanced the money, and the building was erected: Before such mortgage could be executed, the wife died, leaving an infant son, her only heir, and the husband, his father, was appointed his guardian: C. filed a bill in equity against the guardian and the infant, praying the court to decree the sum, advanced as aforesaid, to be a lien on the infant's estate, that the same was a trust in the infant for C., and that the guardian might be authorized and required to mortgage the infant's portion of the land, to secure payment of the sum so advanced and expended. *Held*, that no lien on the infant's estate was created by the agreement under which C. advanced the money, because that agreement was not binding on the infant or his mother, by reason of her coverture. *Held also*, that if there was any lien on the estate, it could not be enforced by a decree made against the infant during his minority. *Held further*, that the husband was not discharged from his personal liability on the agreement. *Coffin* v. *Heath*, 76.

ERROR.

1. It is not a ground of error, that a defendant, who has pleaded in chief, was indicted and convicted by the name of J. T., otherwise called T. D.; misnomer being matter of abatement only. *Turns* v. *Commonwealth*, 224.

2. The *St.* of 1840, *c.* 87, § 5, does not take away the right, given by Rev. Sts. *c.* 114, § 13, to a writ of error to reverse a judgment on an award; it merely gives a cumulative remedy by appeal. *Day* v. *Laflin*, 280.

3. Where a writ of error is brought to reverse a judgment recovered on a note against an infant who appeared by attorney, a promise, made by him after he comes of age, to pay the note, is neither a release nor a waiver of the error, nor a bar to writ of error. *Goodridge* v. *Ross*, 487.

EVIDENCE.

1. On the trial of a party who is indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit coin, with intent to use it, or cause or permit it to be used, in coining or making such coin, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made. *Commonwealth* v. *Kent*, 221.

2. Where the holder of a second mortgage brings a real action to recover from a stranger possession of the mortgaged premises, the tenant cannot defend by giving in evidence the assignment of the first mortgage to him after action brought. *Hall* v. *Bell*, 431.

3. D. recovered judgment, by default, against a school district, in an action on a contract with the district to build a school-house, and levied his execution on the goods of G., a member of the district: G. sued D., in an action of trespass, for so levying on his goods: *Held*, that G. could not give evidence that D. had not performed his said contract, and therefore ought not to have recovered judgment against the district. *Gaskill* v. *Dudley*, 546.

4. In an action of trespass *quare clausum fregit*, the defendant pleaded the general issue, and filed a notice that he claimed and should give evidence of title to the *locus in quo*: The jury found the defendant guilty, assessed damages, and also found that the defendant had no title to the land described in the plaintiff's declaration; and judgment was rendered for the plaintiff. *Held*, that this judgment was not conclusive proof of the plaintiff's right of property in said land, nor of his title to maintain a writ of entry to recover the land from the defendant in that action. *Wade* v. *Lindsey*, 407.

Notice of New Books.

ZEITS-SCHRIFT FÜR VOLKSTHÜMLICHES RECHT UND NATIONALL GESETS-GEBUNG HERAUSGEGEBEN VON GUSTAV EBETZ. HALLE. (Journal of Public Law and National Legislation, edited by Gustav Ebetz.)

THIS is one of the many journals devoted to jurisprudence, which abound in Germany. Like the Law Reporter, it appears in twelve monthly numbers in the course of a year, at the price of four Prussian dollars and three-quarters, or three dollars and forty-two cents of our money. Besides the articles, each number contains an advertisement of the most important, political, legal, philosophical and diplomatic writings, with short remarks on them. It seems that it is the object of this journal to occupy itself with law in its widest extent, with the domestic and foreign, ancient and modern, both as to substance and form, with private and public law, as well as with other branches of knowledge related to law and political science, viewing all in particular regard to the historic development and to the scientific character of jurisprudence.

The following list of the articles in five numbers, beginning with the first number, in January, 1844, will show the topics which have been discussed, and will enable the reader to make an interesting comparison between a German and an American Law Journal.

1st Number, January, 1844. 1. On German national legislation. 2. Contributions for the scientific foundation of the law of nations. 3. Literary notices. 4. Miscellanies.

2d Number. Trial by jury. 1. From a judicial point of view, with particular regard to France. 2. Difference between the English and French proof before a jury. 3. English regulation of juries. 4. Trial by jury, considered from a political point of view. 5. Fœlix against trial by jury. 6. Can juries be supplied by assessors, (Schöppen)? II. Verborum obligatio and exchange. III. Decisions of the court of censure.

3d Number. Education through public schools, as right of the state and right of the citizen. 2. On the projected law on public instruction now before the French chambers. 3. Notices relating to the Russian school institution. 4. On the appellatio tamquam ab abusu. 5. What societies are prohibited by the Russian law. 6. Gustav Adolph's foundation.

4th and 5th Numbers. Theory on possession and property, participation of the clergy in the house of representatives, and literary notices, and miscellanies.

6th. Historical development of the idea of property.

7th and 8th. On penitentiaries. Reviews and miscellanies. On the principle of the Attic legal proceeding and reviews.

9th and 10th. Continuation of Attic legal proceeding, and on provincial and constitutional form of government, and on the practical European international law.

We observe in the tenth number an interesting article on the *Practical European International Law*, by Dr. Pütter. By this term is meant what is sometimes called *Private International Law*, comprehending the topics which are discussed by Mr. Justice Story and other writers, both in the foreign law and the common, under the term, the "Conflict of Laws." The German writer particularly dwells on the merits of the works of M. Fœlix, (whose work deserves special commendation,) and of Mr. Justice Story. Of the latter he speaks as *formerly* Professor of Law in Harvard University, and *then* judge in Massachusetts!

Intelligence and Miscellany.

LEGISLATIVE INTERFERENCE. — The case of Oliver Watkins, who was tried some years since, in the county of Windham, in the state of Connecticut, is a remarkable instance in which the division of power, provided for by the constitution of that state, was broken over by the interference of the legislature with the province of the judiciary. On the 22d day of March, 1829, Watkins murdered his wife, the mother of his children, in her own bed. The crime was committed by means of a cord, so suddenly and powerfully drawn round her neck, while quietly asleep, that strangulation and death ensued, without the slightest noise to awaken the two children in the same room, or the mother of the victim, in an adjoining room. Life having become extinct and the cord consumed in the fire, Watkins himself gave the alarm, but on going to the bed-side with a light, his vision was met by a black mark quite round the neck of the victim, so deeply indented that the perpetrator of the deed involuntarily shrunk back, and attempted to obliterate it by the application of camphor. Finding this impossible, he sought to cover it by the bed cloths. No effort, however, was made to restore life. A daughter, eleven years old, gave her testimony that she saw this application of the camphor, after she had been aroused from her sleep. Here was the man and his murdered wife in the room alone, (except two small children,) the house fastened so that no one could approach from without, the mark of violence deep and deadly upon her person, and so inflicted that every possibility of self-murder was excluded from the case. Watkins being charged with the murder was arrested, and in October, 1829, was tried and found guilty by the jury. His defence was conducted by two able and eloquent advocates, whose zealous and faithful efforts were unable to shield their client from the sentence of death. During the progress of the trial there was no question of law to embarrass either court or jury. The whole matter terminated on the facts submitted to the jury, and of these facts the jury were the only judges. It was their business to weigh the facts and pronounce their verdict. They did so. Four months elapsed, and another term of the same court was holden in the same place, and by law that court possessed the power of hearing a petition for a new trial, had any facts or circumstances warranted such an application. On the first Monday of April following, a new election of members of the general assembly took place, and at their session, in May, 1830, a petition was preferred and heard, *ex parte*, in favor of Oliver Watkins, and thereupon, the general assembly, stepping aside from their obvious line of duty, and forgetting that all judicial proceedings were "confided to a separate magistracy," entertained the petition, and passed a resolve that the superior court should hold a period term, antecedent to the day of execution, and hear a petition for a new trial. The mandate went forth, and the court obeyed. The petition was heard and granted! Thus the course of legal proceedings was interrupted by another branch of the government.

Thus the trust confided to the judiciary was usurped by the legislative branch, and the stream of justice turned out of its channel, forming a precedent of a most dangerous character. It may very properly be remarked, that the

laws of the state had long since regulated the proceedings in the nature of writs of error, and petitions for new trial. For mispleading and newly discovered evidence a petition for a new trial might have been prepared, at the proper time, without this special interference of the general assembly. But that course would not serve the purpose. There must be an excited feeling aroused, a public opinion manufactured, and no place could be found so well adapted to these ends, as the general assembly. The members are collected from all parts of the state — they hear and act upon one side of the case — they listen to unanswered arguments and unchecked eloquence, and most naturally sympathize with the accused, and they carry home to their constituents this sympathy, and spread it among those who are to compose the jury, and it becomes a new element for the mind, and a new obstacle in the way of justice. The day was fixed for the execution of the law, the warrant was signed, but all to no purpose. The magistrates, to whom this important trust was confided, were ordered to desist in the discharge of this public trust.

This whole proceeding of the legislature appears illegal. The division and distribution of power contained in the constitution prohibited all such interference by the general assembly. The accused had no right to overstep the bounds of the law — pass over the proper tribunal, and seek redress from the general assembly, and then come back to a court, with all the influence which could be borrowed from that august body. If legal in that case, so in every other criminal case. Indeed it would be equally legal in every civil case, as well as criminal. What then would become of the division and distribution of the powers of the government, specified and carefully enacted in the constitution? To illustrate the absurdity, let us suppose that in a civil suit A recovers a verdict of ten thousand dollars against B, and has his execution for the same. B fancies that he is now in possession of some new fact or evidence, and instead of presenting to the court his petition for a new trial, in the usual manner, and according to the established rules of law, he should first bring his petition before the general assembly, give no notice to the opposite party, and there have a hearing, *ex parte*, and procure an order from the general assembly to the court, to hold a special session and proceed to hear this case, and thus the verdict should be set aside, the execution vacated, and the judgment overturned. What man among us would not at once condemn the proceeding as illegal and unjust?

Where then is the difference between the supposed case and the real one? There is none. Would the judges sanction such a proceeding? Certainly not. Had the cause been civil in its nature instead of criminal, we venture to say the petition would have been dismissed without hearing, and yet it may be seen by the public records, that the court entertain such a case, and adjudicate upon it, as if it were legal to do so. In the final result of the case, however, this assumption of power, and usurpation of authority failed to screen the accused. The excuse came up again on its merits. Another jury heard it with patience, and again pronounced the verdict of *guilty*. The sentence of the law was carried into effect, and the whole community concur in its justice.

At this late day, allusion is here made to the cause, rather as an example to be avoided, than as fearing the repetition by the legislature of an act of judicial interference so unconstitutional and so fraught with mischief. The act was palpably wrong, and we trust that the marks of error are so visibly stamped upon it, that it never may be drawn into precedent for future cases.

Privilege of Parliament. — John Harlow and his lawyer, P. T. Harbin, were recently brought to the bar of the House of Lords, for a contempt of that body in bringing an action of libel against one Thomas Baker, for words spoken as a witness before a railroad committee of that house. The following was the conclusion of the matter:

Lord Brougham presented a petition from John Harlow, now in custody, stating that since the publication of the report of the committee before which Mr. Baker gave evidence, the petitioner had suffered in his trade and character by the circulation of that report; that proceedings in a criminal court were at that time pending in relation to the mat-

ter to which Mr. Baker's testimony referred, and Mr. Baker was afterwards examined as a witness in those proceedings, but never attempted to prove what he had stated before the committee; that the statement was false and untrue, and the petitioner trusted the house would be graciously pleased to make some allowance for his feelings being so wounded; that he would not have taken the present proceedings, if he had been aware of their being a breach of privilege, and he had accordingly instructed his solicitor to withdraw the action; and the petitioner humbly expressed his extreme regret at having committed a breach of privilege, and hoped the house would be graciously pleased to pardon the offence he had so unintentionally committed. The noble and learned lord added, that it was impossible to express greater contrition for the grave and inexpiable offence of having resorted to the law of the land. It was not known by the petitioner to be a crime; it was known only to parliament; it had never been promulgated in any law. He moved that John Harlow be discharged out of custody on payment of his fees — for so, he was sorry to say, it must be.

The lord chancellor, on the facts stated in the petition, was willing to accede to the motion. As the noble and learned lord was not acting as counsel for this person, the latter must not be answerable for what he had said. (A laugh.)

Lord Campbell concurred in discharging the petitioner, as he had expressed his sorrow for committing a breach of privileges, which, however, were so notorious that he thought no man could be ignorant of them. It would be very harsh to make the petitioner responsible for the sarcasms of the noble and learned lord, which now were rather inopportune.

The motion was agreed to; and,

John Harlow being then brought to the bar,

The lord chancellor said, — You have been guilty of a breach of the acknowledged privileges of this house, in bringing an action against Thomas Baker for words which he had spoken in the course of giving evidence before one of its committees. For that offence you have been committed to custody. You have presented a petition in which you have expressed contrition; and you have also stated that you have given orders to discontinue the action. Their lordships are disposed to deal leniently with you, and, therefore, it is ordered that you be discharged out of custody upon paying your fees.

Mr. Harlow then withdrew.

Lord Brougham then said, that after the rebuke he had received from the junior law lord, who had therefore the zeal of a new recruit in the ranks of the peers and the cause of their privileges, he would not fall into the fault again, lest he also should be committed. He had now a petition to present from Peter Taite Harbin, the attorney who brought the action. It stated, that before bringing it he submittted a case to counsel with the report of the committee; that in commencing proceedings he was wholly ignorant that he thereby committed a breach of privilege; and he begged humbly to express his extreme regret that he had done so, and to state that he had abandoned the proceedings, and hoped the house would be graciously pleased to pardon the offence he had unintentionally committed. He (Lord Brougham) had to move that he be discharged on payment of his fees. The house would do well not to meddle with the learned counsel, though he was the adviser and accessory before the fact.

The lord chancellor observed, that he did not know who it was; but if his noble and learned friend chose to move he could do so.

Lord Campbell thought quite enough had been done ("Hear" from Lord Brougham,) though nothing was to be regretted that had been done. From the zeal of his noble and learned friend, he had no doubt he would pay the fees both of the attorney and the tobacconist. (A laugh.)

Lord Brougham felt he had done quite enough in keeping his gravity during the operation which had lately been performed.

The motion being agreed to, Mr. Harbin was brought to the bar.

The lord chancellor. — You have been taken into custody for a breach of the acknowledged privileges of this house. There are circumstances which would have led me to suppose that you had

advisedly committed that offence, but I will not take upon myself to say that you have done so, because you state yourself that you did it in ignorance. You express your contrition for the offence, and that you are about to proceed to discontinue the action. Under these circumstances their lordships are of opinion that you ought to be discharged upon paying your fees.

Mr. Harbin withdrew.

Lord Campbell gave notice, that early next session, unless the government should do so, or some peer of greater weight than himself, "the junior law lord," and almost the junior in their lordships' house, (a laugh,) he would introduce a bill to enable either house, on an action being brought in violation of its privileges, to stay it, as was now done in the case of actions brought for publishing papers under the orders of either house.

Lord Brougham. — Then there is an end of the privilege; that is quite clear.

A Letter from New York.

To the Editor of the Law Reporter.— The "letter from New York," in the last number of the Reporter, concerning the bar of that city, brings to mind a matter of general impression and remark, to wit; that the bar has degenerated — that its members are, in some way, inferior in learning, ability or character to those of some other times. The impression seems to be somewhat vague and uncertain, but it certainly exists, and is spoken of as an ascertained fact, in no wise disputable. But is it true? I doubt it; and I think that a little careful observation will satisfy us that the bar of this country was never so able, so learned, so astute, as at the present time, and probably never possessed a higher moral tone.

It is not the bar alone that has degenerated, if this impression is to be taken as true, but almost everything else has retrograded in like degree. There is a general downward tendency; the present times are "sadly out of joint." But has it not been always so? Was there ever a time when the degeneracy of the present age was not a subject of lamentation, and the theme of dire forebodings as to the future? Every generation looks back to that which preceded it, with admiration for the intelligence, and veneration for the morality which we are to believe are no longer to be found. And yet there has been a constant, uninterrupted and rapid advancement of human intelligence and morality for the last three hundred years. Local and temporary interruptions may have occurred, but human improvement, in the largest sense, has made steady and rapid progress. The history of the world for the last three centuries, is the history of that progress. And is it to be believed that the bar has degenerated instead of partaking of the general improvement! The supposition is false and absurd. It has neither fact nor fable to support it.

How, then, has it happened that this general impression prevails? It may be because we *know* the men of our own times, that we underrate them in the comparison with those we did not know. We know their faults and their follies, and our admiration of their ability, learning and traits of excellence is moderated and sometimes entirely extinguished by the knowledge that they are not faultless — that their follies and vices, perhaps, are as conspicuous as their talents. And we thus estimate the very men whom the next generation will set up as models, and look upon with profound veneration. We naturally venerate our teachers, and the men of the past are our teachers. Their wisdom is the fountain from which we draw our knowledge during the first half of our lives. Time has thrown her veil over their faults and their foibles, and their shining qualities are no longer obscured. Enmities and prejudices, religious, political and personal, are dead. The bad is forgotten. We see only the great and the good. To speak or think of Washington with any feeling but that of the profoundest reverence, is little short of sacrilege. To speak of Jefferson as anything short of the embodiment and perfection of wisdom and statesmanship, is political heresy, to say the least of it. And yet no public men, in their own times, have been more vehemently decried or more bitterly maligned. Like examples might be multiplied indefinitely. These are mentioned because they are the most prominent, and are always in men's mouths. It would seem that very little reflection is required to con-

vince us that the outcry about the degeneracy of the times is idle and unfounded. But it may be said that these are instances of political characters, and that the same observations are not applicable to lawyers. It must be admitted, however, that great legal reforms have been wrought out, that both the civil and criminal codes have undergone great changes for the better, and if our jurisprudence is not in advance of the times, it certainly is not behind the general improvements of the age. Who but lawyers have done this? I do not speak of legislation alone. In that, others take part and sometimes lead. In that changes are not always improvements. But the changes in the common law are the work of the bar. They do not depend upon prejudice or political partisanship, but are the true indices of human progress.

If these things are so, how can we say that the bar has degenerated? Where is the evidence of it? Are we to compare men, not in classes, but individually, to arrive at a general truth applicable to a class? This method may be most common, but it is least satisfactory, because it makes no allowances for the force of circumstances and external influences. The lawyers of our own time, however, may safely abide this test, narrow and illiberal as it is, with all the influence of contemporary passion and prejudice against them.

But this letter is long enough. At some future time we will look at this matter a little farther.

Yours, truly, —— ——

New York, August, 1845.

Lawyers at New Orleans. — We understand that the supreme court of Louisiana, at the solicitation of the members of the bar, have adopted the following rules: "It is ordered that no person applying for admission as an attorney and counsellor at law, shall be received as such until three judicial days have elapsed, from and after the date of his application, and until his name as a candidate for admission shall have been published for a like time at the foot of the trial list, posted up in the clerk's office; such application to be made through the clerk. The court will require of candidates for admission to the bar, whether previously licensed in another state or not; 1st. Evidence of citizenship of the United States; 2d. Evidence of good moral character; and 3d. Except when a license is produced from the superior courts of another state, evidence of one year's residence in this state. The court will not be satisfied with the qualifications of a candidate, in point of legal learning, unless it shall appear by examination, that he is well read in the following course of studies, at least: Story on the Constitution; the General Laws of the United States; Vattel's Law of Nations; the Louisiana Code; the Code of Practice; the Statutes of the State, of a general nature; the Institutes of Justinian; Domat's Civil Law; Pothier's Treatise on Obligations; Blackstone's Commentaries; Kent's Commentaries; Chitty or Bailey on Bills; Starkie or Phillips on Evidence; Russell on Crimes; and the Jurisprudence of Louisiana, as settled by the decisions of the supreme court. The examination shall be conducted in the following manner: "Every three months in the eastern district, and at the commencement of each term in the western district, the court will appoint from among the members of the bar, a committee of seven, who are earnestly requested to lend their aid to the court. Upon the candidate producing a certificate from the committee, that he has been strictly and rigidly examined by them upon the above works, and that he is in their opinion qualified for the bar, the court will admit him to a public examination; and if, after such public examination, they concur with the committee in opinion, the candidate will be admitted and licensed as an attorney and counsellor, and not otherwise."

Some time since the legislature passed an act, under which a candidate who has been licensed by the superior courts of any other state may, after having obtained a certificate from three practising lawyers of the state, declaring such candidate sufficiently learned in the law, be admitted to a public examination by the supreme court; but the law is regarded as a mere dead letter, except when the candidate insists upon availing himself of its provisions, in which case the court are extremely strict. All the examinations are rigid, much more so

probably than those had in any of the other states.

We learn also that the bar in New Orleans is as much crowded, in proportion to the amount of business done, as in other cities of the United States.

Case of Henry G. Green. — The case of Green, who was tried for the murder of his wife, at the Rensselaer (N. Y.) Court of Oyer and Terminer, in July, before Parker, J., and Davis, Bull and Waite, judges, was one which created much sensation in the neighborhood. The crime for which the prisoner was arraigned was the murder of his wife, in the town of Berlin, in February last. The prisoner was born in that town, and is now twenty-one or twenty-two years old, and is related to very many of the respectable families of that place. In the month of November, the prisoner, who was a merchant, was burnt out, and he was thrown out of business. Soon after a company of temperance performers made an exhibition in that town. A young woman, named Mary Ann Wyatt, aged some eighteen years, was in the company, who, by her personal appearance, excited an interest in the affections of the prisoner. He at once enlisted with the company in their performances. The company not meeting with much success in some adjoining towns, disbanded at New Lebanon; and soon after Green returned to Berlin, and informed his friends that he was to be married a week from the next Sunday night, and invited them to attend his wedding at New Lebanon. But such was the haste of the prisoner to make sure of his prize that he did not wait until the appointed time, but celebrated the nuptial ceremony on the Sunday previous.

On Tuesday night the bridegroom and his bride staid at the house of Ferdinand Hull, in Berlin. On Wednesday the prisoner received a visit from his mother and sister, and held a long private interview with them. On Thursday, Green and his wife with a party of friends took a sleigh ride to Hoosick, and returned with his wife somewhat unwell. On Friday morning, the prisoner went to Dr. Rhoades and procured a box of pills (as he said) for his own use, and returned to Mr. Hull's, where they were boarding. Mrs. Green having a slight cold, was induced to take six pills at the hands of her husband, although against her better convictions. Soon after she was taken with a distress and burning at her stomach. On the night of Friday, however, she was more comfortable. On Saturday morning she was easier, but not well enough to rise. Green went to Hull's, where his wife was, and prepared a solution for his wife, remarking that he was going to give his wife some soda. Shortly after, Green having left the house, Mrs. Hull found Mrs. Green vomiting in great distress, and apparently at the point of death. Dr. Emerson Hull was immediately sent for, and he found the sufferer under the extraordinary symptoms usually attending poisoning by arsenic. He made strict inquiries as to the medicine administered, left prescriptions, and took his departure, leaving also a strict injunction that no drink should in any event be given her. Notwithstanding these directions, however, Green administered a white solution to her, and also some powders, which also the doctor had prohibited. Mrs. Green continued to grow worse, and expressed a wish to see her mother. She afterwards called her husband and asked him if she had ever deceived him in any respect, and he replied no — if she had said or done anything to injure his feelings, and he made the same answer. She then called Dr. Hull to her bedside and desired to make a communication to him, and she then informed him that she was about to die, and told him that everything her husband had administered to her since she was taken sick had distressed her, and once when she asked him for some wine and water, he poured out the liquor, and took out of his pocket a paper and poured a white powder into it. Dr. H. stating that the same facts should be reported to some body else, Mr. B. Streeter was called in, and the same facts were communicated to him also. At this interview she was compelled to suspend her narrative until she rested, but became worse and never was able afterwards to tell the rest of her story. Her malady increased constantly until 10 A. M. on Monday, when she died. Several circumstances were testified to at the trial, tending to fix the guilt of the murder upon Green. The trial occupied sev-

eral days. M. I. Townsend, district attorney, and John Van Buren, attorney general of the state, appeared for the government, and Joshua A. Spencer, Job Pierson, Gardner A. Stowe and Robert A. Lottridge, for the prisoner. The jury found the prisoner guilty, and Judge Parker pronounced upon him the sentence of death, to be executed on the 10th of September.

Governor Baldwin's Message. — We have received the message of Governor Baldwin, of Connecticut, returning the resolution, on the petition of John J. Howe and others against the Washington Bridge Company, with his objections. We gave, in our last, a notice of the report of the committee in favor of the petitioners, and we now proceed to give an abstract of the message. Although acknowledging the principle that individual rights should be subordinate to the general welfare, to a certain extent, Governor Baldwin maintains that, by the constitution, this paramount right of the public is held subject to the condition, that the property of no person shall be taken for public use, without a just compensation therefor. The general assembly, in 1802, had chartered a company with authority to erect a bridge across the Housatonic, with a draw of thirty-two feet. The charter was accepted, and the bridge built. That bridge having been carried away, another was built, and the company were relieved, on application to the general assembly, from some of the conditions of the original charter, as to the materials used in construction. And by the same resolution, passed in 1808, the rights of persons navigating the river were carefully preserved. By this legislation, and the completion of the bridge, the franchise became the property of the company, and could not be taken away without compensation. If the bridge was, at the time of its erection, or had since become an unlawful obstruction, it might be removed as such, on application to the legal tribunals. If the navigation of the river had so increased, as to require a draw of greater width, the general assembly might, in virtue of the right of eminent domain, authorize the construction of a wider draw, or even the removal of the bridge itself, if necessary, subject only to the condition *of providing due compensation therefor*. But it would be a violation of the constitution to oblige the company to make or submit to the alteration, without an adequate compensation for the injury they would sustain. "The preservation of the public faith," as the general assembly had emphatically declared by their solemn resolution of the last session, "is the first great duty of every government."

Motch-Pot.

It seemeth that this word Motch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 287, 176 a.

It is stated in a late Paris journal, that, during the last ten years, there had been no public execution in Stuttgard, Germany. In June last, the scaffold was erected for the decapitation of a young woman, named Margaret Rudhardt, who was sentenced to death for poisoning her husband with arsenic. This act of supreme justice was marked by a strange incident: — The execution here takes place with a sword. The culprit is placed on his knees, with a white handkerchief over his eyes; one of the executioner's assistants then lies down before the culprit, seizes him with his two hands by the thighs, and keeps him immovably fixed to the ground, whilst another holds him by the hair, and draws his head back, so that the muscles of the neck be extended, when the executioner, with his sword, which he grasps with both hands, cuts off the head. At the moment, when the latter was about to inflict the fatal blow on Margaret Rudhardt, a man rushed through the compact crowd that surrounded the scaffold, crying out in a stentorian voice, "Stop! stop!" and waving at the same time over his head a white handkerchief. The executioner instinctively dropped his arm, his aids loosened the victim, removed the bandage from her eyes, and Margaret Rudhardt, who during those awful preparations had exhibited a good deal of calmness, rose smiling, for the unhappy woman as well as the executioner and everybody, — including the recorder of the royal court of Stuttgard, who was on the platform drawing up the minutes of the execution, — believed that she had been pardoned. This, however, was not the case. The author of the incident was arrested, and it was soon discovered that he had been an old servant of Margaret Rudhardt's father, who imagined that, by interrupting the execution, it would be retarded, and that the daughter of his former master would then have a chance of obtaining her pardon. After an interval of half an hour, which was a painful respite for Margaret Rudhardt, she was again obliged to kneel, and justice had its course. The crowd, although much moved by the spectacle, observed the greatest order, and shortly afterwards silently dispersed.